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No. 113

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION

Petitioners, the Honorable Bernard M. Decker, United States District Judge, and the treble-damage plaintiffs, respectfully request this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit, entered on February 4, 1970.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court have not yet been reported. They are respectively printed as Appendices A and B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

QUESTIONS PRESENTED

1. Whether a writ of mandamus can properly be used, despite the "final judgment" rule and 28 U.S.C. § 1292(b), to reverse a trial court's discovery order for the production of statements made by grand jury witnesses to defendants' counsel describing the witnesses' testimony before the grand jury?

2. Whether the Court of Appeals for the Seventh Circuit erred in holding, contrary to the ruling of the Tenth Circuit, that the corporation's attorney-client privilege extends to narrative statements solicited by corporate counsel from non-management employees about their grand jury testimony?

STATEMENT OF THE CASE

This petition arises out of pre-trial discovery proceedings in multi-district antitrust litigation consolidated before Judge Bernard M. Decker, United States District Court for the Northern District of Illinois. The representative plaintiffs instituted class actions to recover damages on behalf of public schools, public libraries, and parochial schools that were victims of a conspiracy by

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[1] On February 11, 1970, the Court of Appeals "Ordered that the issuance of the writ of mandamus be stayed for a period of thirty (30) days from this date, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure, pending application of respondents to the Supreme Court of the United States for a writ of certiorari and until final disposition thereof."

defendant publishers and wholesalers to inflate the prices of library editions of children's books.[2]

For more than a year and a half, plaintiffs have actively pursued discovery, including taking depositions of approximately one hundred witnesses. Faced with a pattern of forgetfulness, recalcitrance, prevarication and evasiveness by the witnesses, plaintiffs moved under Rule 34 for the production of so-called "debriefing" statements, *i.e.*, narrative accounts taken from employees and ex-employees of defendant companies which related to their testimony before a grand jury investigating price-fixing conspiracies in the sale of children's books to public schools and libraries.

Certain defendants opposed such production, interposing the attorney-client privilege and work-product doctrine.[3] Consequently, Judge Decker ordered that all relevant documents be produced, and provided:

> "that if any defendant objects to the production of any document . . . on the grounds of 'attorney-client' or 'work product' privilege, such defendant . . . shall file said document in a sealed envelope, accompanied by a precise factual statement setting forth the circumstances under which the document was prepared." (Order of August 7, 1969)

Upon consideration of the affidavits, briefs, arguments of counsel, as well as a review of deposition testimony and an *in camera* inspection of grand jury testimony,

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[2] The plaintiffs in the treble-damage proceedings here involved, are the States of Illinois, Indiana, Texas, West Virginia, Ohio, Wisconsin, Kansas and Minnesota, the City of Chicago, the Archbishop of Cincinnati, the Metropolitan Government of Nashville and Davidson County, and certain school districts in Nassau and Suffolk Counties, New York.

[3] Counsel for several defendants turned over such "debriefing" statements voluntarily.

Judge Decker found that the attorneys "did not render personal legal advice after the witnesses completed their grand jury testimony," and that "the debriefing consultations were apparently conducted as a favor to the corporations." (Appendix B, pp. 16a, 17a) Moreover, Judge Decker made the following findings:

> (a) "Each witness demonstrated a remarkable lack of memory concerning crucial evidence in controversy" and "what recollection they could muster was often so vague as to be of only limited value." (Appendix B, pp. 10a, 14a)
>
> (b) "Some witnesses have been deliberately evasive," "other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence," and the "deposition testimony sometimes conflicts with documentary evidence which the witnesses personally prepared several years ago." (Appendix B, pp. 8a, 14a)
>
> (c) The recall of each witness was substantially more extensive when he appeared before the grand jury, and "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect." (Appendix B, p. 10a)

In this context, the District Court enumerated several factors justifying release of the debriefing statements to aid plaintiffs in their search for truth:

> "The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten

the details of their operations; frequently, they cannot even remember major incidents in which deviations from 'net' prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances." (Appendix B, p. 21a)

On the record made by defendants, Judge Decker concluded that three "debriefing" statements were privileged and would be returned to counsel. With respect to thirty (30) "debriefing" statements, however, Judge Decker determined that (a) the evidence failed to establish that a confidential attorney-client relationship existed, and (b) plaintiffs had shown "good cause" and "special circumstances" for discovery which outweighed the qualified protection afforded work product, even assuming that simple witness narratives could be called work product. Judge Decker held that the corporate attorney-client privilege attaches when a responsible member of the corporate management seeks or receives legal advice on behalf of the corporation. In this regard, Judge Decker found that only two witnesses "were in a position to influence their company's litigation strategy in these lawsuits. While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases.

Accordingly, the debriefing documents [with two exceptions] are not protected by a corporate attorney-client privilege." (Appendix B, p. 18a)

The defendants sought to have the matter certified for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court, following the holding in *Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964), denied certification on the ground that such a piecemeal appeal would not facilitate the final disposition of the case. (Transcript of Proceedings, October 17, 1969, pp. 39-40)

Upon a petition by defendants, the Court of Appeals granted in part and denied in part a writ of mandamus. The Court of Appeals refused to disturb the District Court's findings that no personal attorney-client privilege existed and that "good cause" had been shown for discovery of the work product of defense attorneys. With respect to the issue of corporate attorney-client privilege, the Seventh Circuit acknowledged that Judge Decker had properly applied the law enunciated in previous federal decisions:

> "The district judge substantially followed the 'control group' test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962), 210 FSupp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.
>
> * * *
>
> Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th

Cir., 1969), 392 F2d 686, 692; *Garrison* v. *General Motors Corp.* (S.D. Cal., 1963), 213 FSupp. 515." Appendix A, pp. 4a, 5a)

The opinion further conceded:

> "If the control group test be wholly adequate, it has not been shown that the district judge erred in his application of it." (Appendix A, p. 4a)

However, noting that the "control group" test has been criticized in four bar journal articles[1] the Seventh Circuit concluded that "the control group test is not wholly adequate" and that:

> "because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (Appendix A, p. 5a)

For these two reasons alone, without any further effort to justify the use of mandamus, the Seventh Circuit ruled that Judge Decker's "order is unlawful" and that "a writ of mandamus will issue compelling respondent district judge to exempt from" his discovery order certain enumerated debriefing statements and "to order the return of each of those debriefing statements to the defendant which produced it."

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[1] Two of the articles cited were written by Bryson Burnham and Erwin Heininger, partners in Mayer, Friedlich, Spiess, Tierney, Brown & Platt, a firm which represents several defendants in this case and which took the lead in seeking mandamus. On the other hand, the Seventh Circuit ignored law review comments which favored application of the control group test. *E.g.*, Gardner, *Agency Problems in the Law of Attorney-Client Privilege*, 42 U. Det. L. J. 105, 117-119 (1964); 8 *Villanova L. Rev.* 423, 426 (1963); 15 *South Carolina L. Rev.* 574, 578 (1963).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S ACTION IN GRANTING MANDAMUS CONTRAVENES THE DECISIONS OF THIS COURT AND CONFLICTS WITH A DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

The circumstances of this case provide no justification for the issuance of a writ of mandamus by the Seventh Circuit. Judge Decker had unquestioned power to order production of the "debriefing" statements under Rule 34 of the Federal Rules of Civil Procedure. The discovery order rested upon legal principles that had been developed in a number of federal and state decisions. Indeed, the Seventh Circuit concluded that Judge Decker properly applied the law embodied in several relevant federal decisions at the trial and appellate level.[5]

Moreover, precedent in addition to the cases cited by the Seventh Circuit supports Judge Decker's discovery order. *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D.N.Y., Dec. 4, 1962) (Ryan, Christensen, J.J.); *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E. 2d 802, 806 (1964). The Seventh Circuit itself has previously indicated acceptance of a standard similar to the "control group" test in *Rucker* v. *Wabash Railroad Co.*, 418 F.2d 146, 154 (7th Cir. 1969):

> "Neither party may successfully assert the attorney-client privilege as to the statements of non-party witnesses. Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451. This is true of defendant's statements given by its servants and agents in this case. None were of such rank as to qualify as representative of the corporate client."

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[5] *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968); *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa. 1962); *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Calif. 1963).

The admission that Judge Decker "substantially followed" all relevant case law vitiates any justification to review his determination by the extraordinary remedy of mandamus.

On numerous occasions the Court has stressed that "only exceptional circumstances amounting to a judicial usurpation of power will justify invocation" of the extraordinary remedy of mandamus to overturn a district court discovery ruling. *Will* v. *United States*, 389 U.S. 90, 95 (1967). The *Will* opinion goes on to state:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" (389 U.S. at 98, n. 6)

This rule and policy against employment of mandamus to review an allegedly erroneous ruling within the jurisdiction of the district court applies with equal force in civil litigation and criminal cases. In *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), a civil antitrust case, this Court reversed a grant of mandamus, holding as follows:

> "The ruling on the question of law decisive of the issue . . . was made in the course of the exercise of the court's discretion to decide issues properly brought before it. . . . Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power [cite] and is reviewable upon appeal after final judgment. . . . Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts

> by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . . ." (346 U.S. at 382-383)

The writ of mandamus cannot be used when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States*, 351 U.S. 513, 520 (1956). As more fully stated by the Court of Appeals for the Fifth Circuit:

> "[M]andamus or prohibition is singularly inappropriate to determine the correctness of a controlling decision of law 'as to which there is substantial ground for difference of opinion.' These extraordinary writs are generally directed toward situations so bold and plain that the trial Judge's actions are examined in the light of the presence or lack of an abuse of discretion. Merely to decide a question of law incorrectly is certainly not an abuse of discretion." *Tokio Marine & Fire Insurance Co.* v. *Aetna Casualty & Surety Co.*, 322 F.2d 113, 115 (5th Cir. 1963).

The power to grant the peremptory writ of mandamus must be "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). A writ of mandamus is an especially inappropriate remedy for review of discovery orders within the discretion of the trial judge.*

In *American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.*, 380 F.2d 277, 283 (2d Cir. 1967), peti-

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* See, *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940); *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2nd Cir.), *stay denied*, 83 S.Ct. 964 (1963) (Harlan, J.); *Paramount Film Distributing Corp.* v. *Civic Center Theatre*, 333 F.2d 358 (10th Cir. 1964).

tioners sought a writ of mandamus to vacate a discovery order, alleging that the documents were protected by the work-product doctrine. The Court of Appeals denied the petition, holding that the decision of the trial court involved the "application of well-known law to commonplace fact, and rested on the district judge's appraisal of facts and exercise of discretion. Whether the order below was correct or not . . . it involved no question of first impression."[7] The same reasons should have precluded the Seventh Circuit's interlocutory review of Judge Decker's discovery order.

The Seventh Circuit's opinion sought to justify the use of mandamus only by assertions that "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice" and "an appeal after disclosure of the privileged communication is an inadequate remedy." Neither assertion offers a valid basis for interlocutory review of Judge Decker's discovery order by mandamus. Moreover, the record contains no evidence to support the assumption that disclosure of these debriefing statements, even if erroneous, would cause any injury that could not be remedied in the

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[7] The additional grounds cited by the opinion in *American Express* v. *Transamerica* for denying the writ of mandamus are particularly appropriate to this case:

> "Besides the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts, we feel that the nature of the present litigation presents another compelling reason for our discretionary refusal to entertain the petition. In a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically preclude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges." (380 F.2d at 284)

normal course of appellate review. The factual affidavits filed by defendants make no claim that production of the debriefing statements would reveal trial strategy, or that any of the debriefing statements contain personal, irrelevant, or otherwise confidential material. As Judge Decker specifically found, "The debriefing statements are essentially factual summaries of the witnesses' testimony" before the grand jury. (Appendix B, p. 15a) The defendants will be "injured" by disclosure of such debriefing statements only if their employees have been dishonest or disingenuous during depositions. This kind of injury provides no ground to invoke the extraordinary writ of mandamus.

Judge Decker framed his discovery order in reliance, *inter alia*, upon the decision in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) (Kirkpatrick, J.), which articulated the so-called "control group" test with respect to whether statements taken from employees who appeared before the grand jury were protected by the corporate attorney-client privilege.* The defendants aggrieved by the discovery ruling in *City of Philadelphia* v. *Westinghouse Electric Co.* sought to reverse Judge Kirkpatrick, but the Third Circuit denied their petition for writ of mandamus. *General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). The reaffirmance of the control group test by many decisions since Judge Kirkpatrick's 1962 opinion makes mandamus even less appropriate now than when the corporate attorney-client privilege issue first confronted the Third Circuit.

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*After delineating the control group test, Judge Kirkpatrick ruled that production of a debriefing statement was "not forbidden by the attorney-client privilege." *City of Philadelphia* v. *Westinghouse Electric Corp.*, 32 F.R.D. 350, 351 (E.D. Pa. 1962).

II. THE OPINION OF THE SEVENTH CIRCUIT AS TO THE SCOPE OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IRRECONCILABLY CONFLICTS WITH THE DECISION OF THE TENTH CIRCUIT IN *NATTA v. HOGAN* AND DECISIONS OF DISTRICT COURTS IN THE SECOND, THIRD, AND NINTH CIRCUITS, AND CONTRADICTS RULE 43 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Seventh Circuit's ruling conflicts with all relevant federal decisions regarding the scope of the corporate attorney-client privilege. Judge Decker expressly followed the law set forth in *Natta* v. *Hogan*, 392 F. 2d 686, 692 (10th Cir. 1969), to determine the limits of the corporate attorney-client privilege:

> "[T]he test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power." (Appendix B, p. 17a)

The Seventh Circuit's rejection of this test as "inadequate" creates an irreconcilable conflict between the Circuits on this important issue of law.

Moreover, the Seventh Circuit's opinion conflicts with "the trend of recent decisions"* beginning with *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483 (E.D. Pa. 1962).

Judge Kirkpatrick's control group test was approved and followed in *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963). With respect to the definition of what persons should "properly be considered within the 'control group' (the client) insofar as it concerns the application of the attorney-client privilege," the *Garrison* opinion reasoned:

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* Advisory Committee's Note, Preliminary Draft of *Proposed Rules of Evidence for the United States District Courts and Magistrates* (Rule 5-03(a)(3)), p. 80.

"Though the members of the 'control group' would be considered to be agents of the corporation within the attorney-client privilege, there must be some limitation with respect to this group or communications from all employees of the company who a member of the 'control group' might designate to give confidential information for the purposes of obtaining legal advice, or to take a substantial part in certain decisions, would be privileged. This would vest authority in the 'control group' to determine those to whom the privilege would apply which could well extend it beyond the purpose for which it was adopted. 65 Yale L. J., 953 at 955 (1956)." (213 F. Supp. at 518)

This holding contradicts and refutes the Seventh Circuit's statement that the corporate attorney-client privilege should apply to a report which any employee makes to a corporate attorney "at the direction of his superiors, in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (Appendix A, p. 4a)

In another electrical price-fixing conspiracy case, Judge Christensen, with the approval of Judge Sylvester Ryan, ruled that the corporate attorney-client privilege did not protect "a stenographically reported statement which had been given by the witness to counsel for his employer, C. H. Wheeler Company, in the presence of the president of the company, concerning the testimony theretofore given by this witness to the Grand Jury." *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D. N.Y., Dec. 4, 1962).

The Seventh Circuit's holding also ignores the decision in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947), that "the protective cloak of [the attorney-client] privilege does

not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." Just as in this case, the witnesses interviewed in *Hickman* v. *Taylor* were employees of the company represented by the attorneys. Moreover, those employees participated in the accident giving rise to that litigation.[10]

In a number of other federal cases following *Hickman* v. *Taylor*, trial courts have ruled that employee interviews by attorneys regarding the performance of the employee's duties are not privileged. *E.g.*, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D.N.Y. 1951); *Humphries* v. *Pennsylvania R.R. Co.*, 14 F.R.D. 177, 178 (N.D. Ohio 1953). These decisions are inconsistent with the Seventh Circuit's holding.

The Seventh Circuit's ruling also conflicts with the requirement of Rule 43(a) of the Federal Rules of Civil Procedure. That rule provides:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts

[10] The distinction suggested by the Seventh Circuit between "witnesses" and "participants" creates a wholly unworkable test to determine the proper limits of the attorney-client privilege. For instance, a number of grand-jury witnesses were employed by several different companies during the price-fixing conspiracy. The attorney-client privilege certainly should not protect what these witnesses told the lawyer for their current employer about testimony concerning their sales practices at other companies. A proper test would focus instead upon whether a confidential attorney-client relationship existed between the employee and the debriefer.

> of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Judge Decker heeded this command, following the uncontradicted line of federal decisions which define the limits of the corporate attorney-client privilege. Moreover, the rule of law applied by Judge Decker has been embodied in the Preliminary Draft of the *Proposed Rules of Evidence for the United States District Courts and Magistrates.* (Rule 5-03(a)(3)) (March, 1969). The Seventh Circuit's preference for the view of the law proposed in certain defense oriented bar journal articles is no basis for mandamus.

It has been held that a federal judge should apply the law of the forum state with respect to claims of attorney-client privilege.[11] On this basis too, the Seventh Circuit was wrong to disturb Judge Decker's discovery order, since the Illinois courts follow the "control group" test. *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E. 2d 802, 806. (1964); *Golminas* v. *Fred Teitelbaum Construction Co.*, 112 Ill. App. 2d 445, 251 N.E. 2d 314 (1969).[12]

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[11] *E.g., Baird* v. *Koerner*, 279 F. 2d 623, 628 (9th Cir. 1961); *Giordani* v. *Hoffman*, 278 F. Supp. 886, 889 (E.D. Pa. 1968).

[12] The only judicial authority cited by the Seventh Circuit in support of its ruling was dictum in an opinion denying mandamus by a state court in another jurisdiction. *D. I. Chadbourne* v. *Superior Court*, 388 P. 2d 700 (Calif. 1964). Such dictum affords no basis for overturning the decision rendered by Judge Decker in accordance with applicable federal and state law.

III. THE SEVENTH CIRCUIT HAS ADOPTED AN AMBIGUOUS AND UNWORKABLE RULE OF LAW WHICH WOULD SERIOUSLY HINDER PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS AND CREATE CONFUSION WITH RESPECT TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL SYSTEM

It has been frequently stressed by this Court "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951).

Due to the inevitable time lapse between a price-fixing conspiracy and the damage trial, access to debriefing statements, such as involved in this case, becomes especially meaningful. Price-fixing conspiracies are often concealed successfully for many years until they disintegrate. Because of the self-concealing nature of the conspiratorial acts, the victims generally do not learn of them until the federal government, equipped with superior means of investigation, has brought charges. For both legal and practical reasons, private damage actions usually do not progress to the discovery stage until the government action is completed or settled. Thus, the discovery aspect of private damage litigation may not occur until three to five years after the conspiracy has been unmasked, and more years after the crucial events and conversations that were the inception of the illegal scheme. If, as frequently occurs, the federal action is settled by a *nolo contendere* plea or consent judgment, damage plaintiffs must themselves prove the violation. In that effort, the great obstacle is the conspirators' lack of memory—real or feigned. Accordingly, there is a great need for materials that will refresh recollection or reveal that stories have altered with the passage of time. In this litigation,

for instance, the debriefing statements record interviews in 1966, whereas depositions were not conducted until 1969.

As the District Court concluded, the debriefing statements may refresh deposition recollection and disclose relevant aspects of the price-fixing conspiracy not probed by the grand jury. Moreover, the few debriefing statements already obtained by plaintiffs in this case show that witnesses concealed valuable information in both grand jury and deposition testimony.[13]

The debriefing statements are valuable to plaintiffs as clues to whether a deponent or trial witness has been evasive or dishonest. Since corporations have no privilege against self-incrimination, corporate counsel cannot prevent their employees from being deposed or called as witnesses.[14] Thus, they cannot prevent revelation that the company has defrauded or injured its customers. If the debriefing statement is identical to a deponent's testimony, it reveals no secrets to plaintiffs. Therefore, keeping debriefing statements secret would not safeguard client con-

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[13] For example, Clarence N. Roland who was sales manager at different times for three separate defendants, Childrens Press, Golden Press and Follett, had his deposition taken. Pursuant to Judge Decker's order, Childrens Press submitted Roland's debriefing memorandum to plaintiffs. This memorandum revealed sharp factual contradictions with the deposition testimony and revealed further that the witness had consciously withheld information from the grand jury itself. The following statement in the memorandum is illustrative:

> "Roland told the debriefers but not the grand jury that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5)

The expression that publishers "did purposely 'lose' orders from discounting jobbers" described a device used by publisher defendants to coerce jobbers into maintaining the fixed net prices as charged in the complaints.

[14] *Hale* v. *Henkel*, 201 U.S. 43, 73 (1906); *Wilson* v. *United States*, 221 U.S. 361 (1911).

fidences but only conceal the fact that an employee has lied or prevaricated during a deposition.

The problems in this area were considered by the distinguished committee preparing the rules of evidence for use in all federal district courts. Their preliminary draft sets forth the general rule of privilege as follows:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications (1) between himself or his representatives and his lawyer or his lawyer's representatives." (Rule 5-03(b))

A "representative of the client" is defined as

> "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." Prelimnary Draft of *Proposed Rules of Evidence for the United States District Courts and Magistrates* (Rule 5-03(a)(3))

Moreover, the Advisory Committee's Note cites with approval *City of Philadelphia* v. *Westinghouse Electric Co.* and *Natta* v. *Hogan,* the cases which the Seventh Circuit seeks to repudiate. (pp. 80-81)

The Seventh Circuit's opinion cites the *Proposed Rules of Evidence,* but ignores its recommendation. It cites ample federal precedent for the "control group" test followed by the District Court, but then issues a writ to prevent the District Court from enforcing its order based on this rule of law.

The issuance of the writ of mandamus under these circumstances was unjustified. The rule fashioned by the Seventh Circuit would hamper private enforcement of the antitrust laws and would create uncertainty and confusion in the administration of the rules of discovery in the fed-

eral courts. It is essential for this Court to resolve this important issue.

CONCLUSION

For the reasons set out above, this Court should grant certiorari to resolve the conflict between the decision of the Seventh Circuit and those of the Tenth and Third Circuit Courts of Appeals, to establish rules defining the proper scope of the corporate attorney-client privilege, and to reestablish limits on the use of mandamus to avoid the "final judgment" rule and 28 U.S.C. § 1292(b).

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — JANUARY SESSION, 1970

No. 18008

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

v.

HONORABLE BERNARD M. DECKER, United States District Judge,

Respondent.

Petition for Writ of Mandamus

February 4, 1970

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges*.

PER CURIAM. In more than forty separate antitrust actions brought in eight judicial districts, plaintiffs, state and local governments, public schools, and public libraries, sought damages from twenty-three defendants (petitioners here), publishers and wholesalers, for alleged conspiracies to inflate the prices for children's editions of library books. Pursuant to 28 U.S.C. §1407 these actions were transferred for consolidated discovery and pretrial proceedings to the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Bernard M. Decker, presiding. Petitioners seek mandamus to compel the district judge to vacate an order dated October 17, 1969 insofar as it permitted plaintiffs

to inspect and copy certain memoranda, all but one of which were prepared by attorneys while "debriefing" a number of persons (each an employee or former employee of one of petitioners) shortly after each had testified before a federal grand jury investigating various aspects of the publishing industry.

Plaintiffs sought production of these memoranda under Rule 34, F.R.C.P. Petitioners countered with the claim that the debriefing memoranda were protected by the attorney-client privilege or as attorneys' work product. The judge ordered petitioners to submit the memoranda under seal, and to file a precise factual statement setting forth the circumstances of the preparation of each.

The judge did not examine the memoranda. In every instance but two, he decided that neither an attorney-client privilege nor any status as work product excused discovery.

The judge refused to make a certification under 28 U.S.C. §1292(b), for the purpose of appeal. Petitioners sought mandamus, and because an appeal, ultimately, from the final decision would be an inadequate remedy, we ordered an answer and briefs.

The claims made by petitioners fall under the following topics: (1) Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged. (2) Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged. (3) Whether the memoranda were protected work product of the attorney. (4) Whether good cause was shown for discovery of work product.

(1) *Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged.*

The judge had before him assertions on this point in affidavits and depositions. In at least three instances

(Davidson, Rose and Rowe), there was a difference between the statement of the attorney and of the person interviewed which raised a degree of ambiguity. There was at least one assertion of the existence of a personal attorney-client relationship with respect to Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Stokes, Street, Davidson, Rose, Rowe, Callaway, and witnesses "A" and "B" of Golden Press.

The judge decided that there was no personal attorney-client relationship in these instances because it failed to appear that the attorney did (1) render personal legal advice to the witnesses, (2) advise them on personal matters, or (3) bill them for services. He concluded that the witnesses talked to the attorneys as a favor to the respective corporations.[1]

Petitioners can not assert the privilege of the individuals, if such privilege existed. The attorneys could presumably assert their obligation to the individuals, although the attorneys are before this court only as counsel for petitioners.

In any event we do not find the existence of personal attorney-client relationships so clearly established that mandamus is appropriate to compel the district court to recognize the privilege which would arise therefrom.

(2) *Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged.*

Some of the persons interviewed were no longer employees at the time of the interview; others were employed by one of petitioners at the time of interview, but were interviewed by counsel for another petitioner. Neither group need be considered under this topic.

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[1] The Bonsal memorandum is not involved in this proceeding. The judge found a personal attorney-client relationship and held the memorandum privileged.

Messrs. Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker were employees of the corporate client at the time of the interview. It is sufficiently clear that each employee made his disclosure to the attorney at the direction of his corporate employer and on its behalf; and that the subject matter of his grand jury testimony and of the debriefing interview was germane to the duties of his employment. On the other hand, although some of these employees had supervisory or even policy making responsibilities with respect to the branch of the corporate business with which they worked, it was not demonstrated that any of these employees was in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, nor that he was a member of a group having that authority.[2]

The district judge substantially followed the "control group" test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962) 210 FSupp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.

If the control group test be wholly adequate, it has not been shown that the district judge erred in his application of it.

Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th Cir., 1969), 392 F2d.686, 692; *Garrison* v. *General Motors Corp.* (S.D.

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[2] The Bonsal and Milne memoranda are not involved in the present proceeding. The judge found that Bonsal and Milne were members of the control group of their employer, and held their communications privileged.

Cal., 1963), 213 FSupp. 515. It has been criticized. Burnham, Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois, 56 Ill. B.J. 542, 545-48 (1968); Heininger, The Attorney-Client Privilege as it Relates to Corporations, 53 Ill. B.J. 376, 384 (1965). Broader tests have been suggested. See Pye, Fundamentals of the Attorney-Client Privilege, 15 Prac. Law. 15, 19 (Nov. 1969); Maurer, Privileged Communication and the Corporate Counsel, 28 Ala. Law. 352, 375 (1967); *D. I. Chadbourne, Inc.* v. *Superior Court* (1964), 36 Cal. Rptr. 468, 388 P2d 700, 709.

We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.

It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.

We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

And because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.

(3) *Whether the memoranda were protected work product of the attorney.*

We think that the district judge incorrectly suggested that some of the memoranda did not qualify as work product because "the lawyers functioned primarily as investigators." Where an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator. See *Hauger* v. *Chicago, Rock Island, and Pacific R. Co.* (7th Cir., 1954), 216 F2d 501; *United States* v. *American Optical Co.*, 37 F.R.D. 233, 238 (E.D. Wis., 1965); *United States* v. *Aluminum Co. of America*, 34 F.R.D. 241, 242-3 (E.D. Mo., 1963). Indeed, the qualified privilege might even attach to a document prepared under the supervision of the attorney even though not drafted by the attorney himself. *Alltmont* v. *United States* (3rd Cir., 1950), 177 F2d 971, cert. den. 339 U.S. 967 (1950). Of course, the less the lawyer's "mental processes" are involved, the less will be the burden to show good cause. *United States* v. *Swift & Co.* (N.D. Ill., 1959), 24 F.R.D. 280, 284.

(4) *Whether good cause was shown for discovery of work product.*

The judge made specific findings of good cause for permitting plaintiffs to examine the grand jury testimony of nine of the person who were later interviewed by the attorneys. Three of them are not involved in the present proceeding. The debriefing memoranda of five of them, Callaway, Dyckman, Hood, Sciosia and Thompson, we have held protected by the attorney-client privilege of their employers. Rust is the one remaining. The judge found, from comparison of his deposition with his grand jury testimony, that there were material discrepancies and failures to recall significant facts. It seems clear that, insofar as the character of this memorandum as work product remains relevant, good cause was properly found.

We are unable to determine whether the district judge inspected any depositions other than those taken from the above mentioned nine. As to the remaining memoranda, the determination of good cause seems to rest generally on a finding that a six year lapse of time would inevitably cause memories to dull coupled with findings apparently based on conclusions regarding the deficiencies of the nine depositions examined. In these instances more specific findings as to each individual would have been better. See *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.* (7th Cir., 1954), 216 F2d 501, 505. We conclude, however, that lack of good cause has not been made to appear sufficiently for issuance of a writ of mandamus. Thus the order under attack will stand as to all debriefing memoranda except in those instances where we have determined in part (2) above that the corporation's attorney-client privilege protects from discovery.

A writ of mandamus will issue compelling respondent district judge to exempt from his order of October 17, 1969, the debriefing statements of the following: Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker, and to order the return of each of those debriefing statements to the defendant which produced it. In all other respects the petition for mandamus is denied. Petitioners are to submit a proposed writ following the procedure prescribed by Rule 19 F.R.A.P. for settlement of judgments enforcing orders of agencies.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

STATE OF ILLINOIS, Plaintiff, -vs- HARPER & ROW PUBLISHERS, INC., et al., Defendants. AND RELATED CASES.	No. 67 C 1899

MEMORANDUM OPINION

Pursuant to 28 U.S.C. § 1407, more than forty separate antitrust actions have been transferred to this court for consolidated discovery and pretrial proceedings. Originally instituted in eight judicial districts, the private treble damage suits seek compensation from publishers and wholesalers for alleged conspiracies which inflated the prices for children's editions of library books. The plaintiffs are state and local governments, public schools, and public libraries.

In an ambitious discovery program, the parties have deposed approximately one hundred witnesses during the last four months. Since many of the central events occurred six to ten years ago, the deponents' memories are often incomplete. Some witnesses have been deliberately evasive. Other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence. Deposition testimony sometimes conflicts with documentary evidence

which the witnesses personally prepared several years ago. The plaintiffs therefore seek to inspect the grand jury transcripts of eleven witnesses who testified about three years ago.[1] In addition, the public schools and libraries ask that the publisher and wholesaler defendants produce all debriefing memoranda that summarize the deponents' grand jury testimony.

After discussing whether the grand jury transcripts should be released, this opinion will outline the procedure which will govern the disposition of additional requests for the disclosure of transcripts. Then, the defendants' two objections to revealing their debriefing documents, the attorney-client privilege and the work product doctrine, will be analyzed.

I. GRAND JURY TRANSCRIPTS.

Rule 6(e) of the Federal Rules of Criminal Procedure declares that:

> "[Persons] may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding . . . No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The disclosure of grand jury minutes is committed to the sound discretion of the trial judge. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959). In cases of particularized need, the long established policy of grand jury secrecy is lifted discretely and limitedly. To illustrate, in *United States* v. *Procter & Gamble,* 356 U.S. 677, 683 (1958), the Supreme Court explained that "the use of the grand jury transcript at the trial to impeach

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[1] In 1966 the federal government convened a criminal grand jury to investigate the pricing of library editions of children's books. Although nearly ninety witnesses testified, the United States decided not to seek indictments.

a witness, to refresh his recollection, to test his credibility and the like" constitute particularized need.[2] See *Dennis* v. *United States*, 384 U.S. 855, 873-874 (1966).

A. *In Camera Inspection*

Plaintiffs want to examine the transcripts of John Callway, Joseph Christie, Francis H. Dyckman, Jr., S. Gordon Ferguson, Alan C. Hood, Thomas Maher, Paul D. Rust, Frank Scioscia and James L. Thompson.[3] The publishers and wholesalers maintain that the transcripts are sought purely for discovery purposes. But the vast majority of the witnesses are beyond the subpoena power of the forum court. The depositions are therefore evidentiary. The use of grand jury minutes to refresh the deponents' recollection or to impeach their statements is equivalent to their use at trial.

During the depositions, each witness demonstrated a remarkable lack of memory concerning critical events in controversy. This court's *in camera* inspection of the witnesses' grand jury transcripts reveals that each witness' recall was substantially more extensive in 1966. In each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect. *Compare Atlantic City Electric Co.* v. *A.B. Chance Co.*, 313 F.2d 431, 434 (2nd Cir. 1963); *Con-*

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[2] *Compare United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940):

> "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

[3] Two additional grand jury witnesses, James F. Heidelberger and William J. Hoocker, are either deceased or too sick to be deposed. Other than a declaration of relevancy, plaintiffs have advanced no showing of particularized need. Moreover, the testimony recorded in the transcripts of Heidelberger and Hoocker would be inadmissible at trial. Accordingly, these transcripts will not be released.

solidated Edison Co. of N.Y. v. *Allis-Chalmers Mfg. Co.*, 217 F.Supp. 36, 38 (S.D. N.Y. 1963). Furthermore, as Judge Boldt stated in *In re Sellers*, 32 F.R.D. 473, 477 (N.D. Ill. 1962):

> "[T]he likelihood that the witness' recollection will become even dimmer by the time of trial is itself an important reason for allowing disclosure at this stage of the proceedings."

In the interest of justice, there is a compelling need for the disclosure of the requested minutes.

The most relevant parts of the transcripts are interwoven with the remainder of the witnesses' testimony, so that various portions should not be segregated from one another. The entire transcripts will be released since they contain no extraneous matter. Neither the votes nor the deliberations of the grand jurors appear in the minutes.

The following protective order will guard the integrity of all released minutes:

> "The transcript is provided solely for the personal perusal of counsel and shall be used only for such further interrogation of deponents as may be authorized. No part of the transcript shall be copied or reproduced, and the entire transcript shall be returned to this court when its use has been completed."

See *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce*, 323 F. 2d 233, 237 (5th Cir. 1963).

B. Additional Transcripts.

Since the public schools and libraries will undoubtedly seek to inspect additional grand jury minutes, the procedure governing their release may appropriately be discussed at this time.[4]

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[4] The conclusions reached in this section also provide an alternative ground for releasing the nine transcripts considered in part *I.A. supra.*

Five policy reasons have traditionally been advanced for imposing secrecy upon grand juries.[5] The only relevant justification for secrecy here is encouraging free future disclosure by individuals with information about antitrust violations. See *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 490 (E.D. Pa. 1962). In particular, since potential witnesses are normally employees, customers or suppliers of the offenders, the witnesses might suffer retaliation if their testimony became public. On the other hand, *Dennis* v. *United States*, 384 U.S. 855 (1966), significantly eroded the principle of grand jury secrecy when its main justification is encouraging the subsequent disclosure of crimes. In criminal prosecutions, the witnesses' grand jury minutes must be furnished directly to the defendant once particularized need is established, thus publicizing the earlier testimony.

Moreover, the Supreme Court indicated that a showing of particularized need varies depending upon the impor-

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[5] See *United States* v. *Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

See also *United States* v. *Procter & Gamble*, 356 U.S. 677, 681 n.6 (1958).

tance of maintaining secrecy in each individual situation.[6] When a treble damage suit is tried, grand jury witnesses are usually called to testify. Their earlier disclosure may then become public knowledge, thus exposing them to potential retaliation. Release of the grand jury minutes during discovery merely advances the same dangers created at trial.[7] In his dissent to *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 406 (1959), Mr. Justice Brennan explicated that:

> "Disclosure of his testimony before the grand jury is hardly likely to result in any embarrassment that his trial testimony has not already produced. 'If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm . . . which his testimony on the open trial does not equally tend to produce.' 8 Wigmore, Evidence (3d ed. 1940), § 2362, at 725."

Furthermore, relatively little secrecy surrounds the 1966 children's books grand jury. The defendants' attorneys con-

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[6] "Certainly in the context of the present case, where the Government concedes that the importance of preserving the secrecy of the grand jury minutes is minimal and also admits the persuasiveness of the arguments advanced in favor of disclosure, it cannot fairly be said that the defense has failed to make out a 'particularized need.'" 384 U.S. 871-872.

[7] After reviewing the judiciary's increasing willingness to release grand jury minutes, Mr. Justice Fortas recently declared that:

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." 384 U.S. at 870.

Dennis v. *United States*, 384 U.S. 855, 870 (1966). While the Supreme Court has not yet authorized automatic disclosure in treble damage actions, the scope of discovery is normally wider in civil litigation than in criminal prosecutions.

tacted numerous witnesses immediately after their appearance and recorded the substance of the witnesses' testimony in debriefing memoranda.[8] After preparing their own testimony summaries, other witnesses circulated their debriefing statements to their corporate superiors. The publishers' and wholesalers' reliance upon the principle of grand jury secrecy is designed to conceal from the public schools and libraries relevant information which the defendants have already assembled.

During the nine depositions discussed in part *I.A. supra*, the witnesses were repeatedly unable to recall significant facts. What recollection they could muster was often so vague as to be of only limited value. Their testimony sometimes conflicted with documentary evidence, including correspondence to and from the witnesses themselves. Since the importance of preserving the instant grand jury minutes is minimal, *in camera* analyses will not be conducted in the future if the public schools and libraries demonstrate similar recalcitrance and unexplained failures to remember.[9] Such a showing will constitute particularized

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[8] One law firm interviewed at least ten witnesses, including several employees of unrelated companies.

[9] In a related context, Chief Judge Pence explained that:

> "It is now well settled that disclosure rather than suppression of relevant materials in grand jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting disclosure of relevant testimony therein."

State of Washington v. American Pipe & Const. Co., 41 F.R.D. 59, 63-64 (S.D. Cal. 1966).

need justifying the release of the witnesses' grand jury transcripts.[10]

II. DEBRIEFING MEMORANDA.

Plaintiffs' examination of additional grand jury minutes will require that a witness first be deposed. As a more complete aid to discovery, the public schools and libraries therefore seek to inspect the debriefing memoranda which were prepared soon after the witnesses testified before the grand jury. The debriefing statements are essentially factual summaries of the witnesses' testimony.[11] The documents may substantially refresh future deposition recollection, thereby rendering extensive transcript requests unnecessary. Furthermore, the debriefing statements may discuss relevant aspects of the alleged price fixing conspiracy which

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[10] Having invaded the grand jury secrecy by their debriefing of the witnesses, the defendants have advanced no compelling policy justification for withholding the transcripts from the plaintiffs. Therefore, the public schools and libraries may be entitled to examine the minutes prior to deposing the witnesses. Rather than releasing the minutes in a wholesale fashion, the court might disclose only the transcripts of those witnesses whom the plaintiffs actually expect to question. But, the broad holding of *United States* v. *Procter & Gamble*, 356 U.S. 677, 683 (1958), suggests that such a decision could be appropriate for certification under 28 U.S.C. § 1292(b), thus completely halting discovery for many months. At this stage of the litigation, an early release of the minutes does not warrant the substantial delay which might ensue.

[11] The memoranda were filed with this court in sealed envelopes, accompanied by a precise factual statement specifying how the documents were prepared.

In their briefs, several defendants object strenuously to any unsealing of the envelopes, including *in camera* inspection. The envelopes therefore remain unopened. But as a consequence, ambiguities and omissions in defendants' factual statements have necessarily been construed against them.

were not probed by the grand jury, thus supplementing the minutes which will be released today.[12]

When the debriefing documents were prepared, counsel often assisted witnesses in their recollection.[13] Defendants therefore resist production under F.R.C.P. 34, maintaining that the documents are insulated by the attorney-client privilege and by the work product doctrine.

A. *Attorney-Client Privilege.*

Communications from a client to a lawyer may be immune from discovery. See, *e.g., Radiant Burners, Inc.* v. *American Gas Ass'n.*, 320 F.2d 314, 324 (7th Cir. 1963).[14] Either of two varieties of the attorney-client privilege can exist. First, when the debriefing statements were prepared, counsel and the witnesses may have had a personal attorney-client relationship. While numerous defendants claim such immunity, they failed to present any factual support for their assertions. With one exception,[15] the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony, (2)

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[12] For example, in order to clarify the scope of the grand jury's inquiry, a witness may have specified that there were no questions concerning various enumerated incidents of dubious legality. Such a debriefing statement could be valuable to refresh a witness' recollection or to impeach deposition statements.

[13] The memorandum may have been designed to circumvent the secrecy surrounding grand juries. By aggregating the statements from most subpoenaed witnesses, antitrust defendants might determine what evidence was presented to the grand jury.

[14] The Seventh Circuit held that the attorney-client privilege protects "confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby."

[15] Prior to Bonsal's grand jury appearance, his lawyers prepared wills for the family, thus establishing a personal attorney-client relationship. Bonsal's debriefing memorandum will be returned unopened.

advise them on other personal matters, or (3) bill the witnesses for their services. Since the lawyers' respective law firms were counsel for the witnesses' employers, the debriefing consultations were apparently conducted as a favor to the corporations. The documents are thus not protected by a personal attorney-client privilege.

Second, a corporate attorney-client privilege could have existed. See, *e.g.*, *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 359-360 (D. Mass. 1950); *Radio Corp. of America* v. *Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955). But only communications from certain employees to the company's attorney create that relationship. Specifically, a responsible member of the corporation's management or control group must seek legal advice about corporate affairs. See, *e.g.*, *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).[16] Moreover, the corporate official must be in a position to influence the decision about which legal counsel is sought. In *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968), the Tenth Circuit stated that:

> "[T]he test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power."

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[16] "[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, of if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."

See also *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Cal. 1963).[17]

In the instant cases, the debriefing memoranda were created to assist the publishers and wholesalers in defending the actions instituted by the federal government and private treble damage plaintiffs. Only Bonsal and Milne were in a position to influence their company's litigation strategy in these lawsuits.[18] While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases. Accordingly, the debriefing documents are not protected by a corporate attorney-client privilege.

B. *Work Product Doctrine.*

The work product doctrine protects counsel's legal strategies and thought processes from discovery by an adversary. *Hickman* v. *Taylor*, 329 U.S. 495, 509 (1947). The principle does not, however, insulate non-legal services rendered by persons who happen to be attorneys.

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[17] Defendants rely heavily upon *Continental Oil Company* v. *United States*, 330 F.2d 347, 349 (9th Cir. 1964). In an abbreviated opinion, the Ninth Circuit concluded that personal and corporate attorney-client relationships existed. The Court did not analyze which corporate officials' consultations create the privilege.

[18] These individuals' memoranda will be returned in the sealed envelopes.

Mr. Milne "participated in—and in some instances controlled—the decisions which William Morrow and Company made in connection with the corporate conduct which forms the basis of these actions."

The statements may be divided into two categories.[19] In the first group, the lawyers functioned primarily as investigators. By asking questions and recording the answers, they attempted to reconstruct the witnesses' grand jury testimony. Such periphal participation by a lawyer does not convert a factual summary into his work product. In *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D. N.Y. 1951), Judge Weinfield expounded that:

> "The rationale underlying. . .[*Hickman* v. *Taylor*] was intended to apply only when [an attorney] acts in his true professional capacity.
>
> "It is a fair inference that the procurement of the statements . . . was not the result of any basic professional relationship between the lawyer . . . . and the defendant, or that it required the training, skill and knowledge of a lawyer or the essential integrity implicit in the lawyer-client relationship. The services were those normally rendered by an investigator or claim agent . . ."

See *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264, 267 (D. Colo. 1963).

Second, certain statements, such as those of Hoocker and Rowe, contain counsel's "recollections, observations, comments and impressions about [the witness'] report of his appearance before the grand jury." Assuming *arguendo* that these nebulous additions constitute work product, these documents are only entitled to limited pro-

---

[19] According to Golden Press, Inc., its document B-1 "is not a debriefing memoranda. . .

> "The document consists primarily of statements by counsel. Only a very small portion of the memoranda concerns statements made by the witness during the course of his examination by the grand jury."

The statement will therefore be returned to the defendant.

tection since they remain basically summaries of testimony.[20]

Under F.R.C.P. 34, work product materials may properly be examined by the opposing party if there exists good cause or special circumstances which justify invading the attorney's thought processes. See, *e.g., Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 207 F.Supp. 407, 410-411 (M.D. Pa. 1962).[21] In determining whether good cause has been established, the harm caused by revealing lawyers' work product is compared with the need for discov-

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[20] Counsel have not indicated that their professional abilities were utilized; presumably, the documents do not include legal analysis nor do they discuss litigation strategy.

If the mere physical involvement of an attorney converted documents into work product, parties could easily insulate damaging evidence from an adversary. Alternative discovery procedures, such as depositions and the production of related materials, might be less revealing than the documents clothed with immunity.

[21] Contrast *Allmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), and *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954), in which the moving parties failed to make the requisite showing of good cause. Nevertheless, the Seventh Circuit explained that:

> "The presence of special circumstances might, of course, constitute good cause for the entry of an order to produce such statements for examination." 216 F.2d 507.

Judge Robson denied discovery of work product statements in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F.Supp. 736, 741 (N.D. Ill. 1962), because:

> "Plaintiffs in their brief admit that no showing of good cause along traditional lines has been presented. They argue that the unique character of this litigation is of itself a sufficient showing of good cause for production."

ery. In *United States* v. *Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959), Judge Hoffman thus declared that:

> "The privilege of the lawyer's work product and the showing of good cause sufficient to overcome it are interdependent, and when, as here, the factors supporting the claim of privilege are weak, the requisite showing of good cause is correspondingly lessened."

The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from "net" prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances.

When compared to the defendants' minimal work product claims, the plaintiffs' need for discovery establishes good cause under F.R.C.P. 34. Plaintiffs have demonstrated special circumstances which justify the disclosure of counsel's comments and notations that were interspersed among the factual summaries of grand jury testimony. See, *e.g.*, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 47 (S.D. N.Y. 1951); *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Dela. 1954); *Sharon Steel Corp.* v. *Travelers Indemnity Co.*, 26 F.R.D. 113, 115 (N.D. Ohio 1960). Accordingly, except for the Bonsal and Milne documents, all debriefing memo-

randa may be examined by the plaintiffs. The statements will not be returned to the defendants at this time.

III. CONCLUSION.

Nine of the requested grand jury transcripts will be released since the plaintiffs have demonstrated particularized need. The importance of maintaining secrecy is minimal in these consolidated cases. In the future, grand jury minutes will be released without an *in camera* inspection if plaintiffs establish that the deponents have a glaring failure of memory or that their testimony contradicts reliable documentary evidence.

With respect to the debriefing documents, only the Bonsal memorandum is privileged because of a personal attorney-client relationship. Similarly, the corporate attorney-client privilege protects only the Bonsal and Milne documents. The other witnesses were not members of the corporation's control group. Finally, none of the documents is immunized by the work product doctrine since counsel's peripheral participation is outweighed by the compelling need for discovery in these actions.

Enter:

/s/ Bernard M. Decker
United States District Judge.

Dated: October 7, 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted]1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1337

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 1970 CCH Trade Cases ¶ 73,084. The opinion of the District Court is reported at 1969 CCH Trade Cases ¶ 72,965. Both of those opinions are printed as appendices to the petition herein—the opinion of the Court of Appeals as Appendix A, and the opinion of the District Court as Appendix B—and citations to those opinions in this brief will be to the pages of those appendices to the petition.

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation in situations where, in the words of the Court of Appeals, "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment"?

2. Whether the Court of Appeals properly exercised its discretion in issuing its writ of mandamus to direct that, in accordance with the above test, plaintiffs' counsel should not be permitted access to 17 attorneys' memoranda which reflect communications between the attorneys and employees of their corporate clients?

STATEMENT OF THE CASE

The petition herein arises out of discovery proceedings in certain private antitrust treble damage actions (alleging price-fixing in the sale of library editions of children's books) which have been consolidated for pretrial purposes (pursuant to 28 U.S.C. § 1407) before petitioner, Honorable Bernard M. Decker, Judge of the United States District Court for the Northern District of Illinois. The petitioners here are, in addition to Judge Decker, various plaintiffs in those treble damage actions ("plaintiffs"); respondents here are some of the defendants in those actions ("defendants").

In particular, the petition relates to plaintiffs' efforts to obtain disclosure of 17 attorneys' memoranda. Each of those memoranda was prepared by an attorney for one of the corporate defendants to describe a conference between that attorney and an employee of his corporate client.

Those attorneys' memoranda, as well as various other documents, were the subject of a motion for production of documents which plaintiffs filed in August, 1969. At that time defendants opposed disclosure of the 17 attorneys' memoranda in question, on the ground, *inter alia*, that the attorney-client privilege protected the confidentiality of those memoranda.*

In an opinion dated October 7, 1969, Judge Decker concluded that the attorney-client privilege did not extend to the 17 attorneys' memoranda. He held that the privilege preserves the confidentiality of communications between an attorney for a corporation and an employee of the corporation *only* if the employee is (1) "a responsible member of the corporation's management or control group", who is (2) seeking "legal advice about corporate affairs", *and* who also is (3) "in a position to influence the decision about which legal counsel is sought" (Appendix B, p. 17a). Judge Decker found that only two of the more than thirty attorneys' memoranda which were at issue before him related to attorneys' communications with employees of their corporate clients who were

> "in a position to influence their company's litigation strategy in these lawsuits. While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases." (Appendix B, p. 18a).**

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* The petition does not raise any question with respect to the other grounds urged by defendants in opposition to plaintiffs' motion for disclosure of those 17 attorneys' memoranda.

** In the same opinion, Judge Decker ordered (1) disclosure of nine of the eleven grand jury transcripts which plaintiffs also had re-

Continued on page 4

On October 17, 1969, Judge Decker entered an order incorporating the rulings which he had made in his October 7 opinion. Defendants requested that Judge Decker include in that order a statement of certification, pursuant to 28 U.S.C. § 1292(b), to permit an immediate appeal with respect to certain questions raised by the opinion, but Judge Decker denied the requested certification.

Defendants thereupon petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus compelling Judge Decker to vacate certain portions of his October 17, 1969 order. In a *per curiam* opinion dated February 4, 1970, the Court of Appeals held that a writ of mandamus should issue to prevent disclosure of the 17 attorneys' memoranda which reflect communications between attorneys for corporations and employees of their corporate clients.* The Court of Appeals concluded that Judge Decker had erred in holding that the protection

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Footnote continued from page 3

quested at that time, and (2) production of certain other attorneys' memoranda which defendants had contended were protected by the work product doctrine and/or by an attorney-client privilege arising out of *personal* (as distinguished from *corporate*) attorney-client relationships. Those aspects of Judge Decker's opinion, which are treated in points (1), (3) and (4) of the opinion of the Court of Appeals, are not, of course, challenged in the petition. We mention them only because several of the quotations in the petition (pp. 4-5) are taken from inapposite portions of Judge Decker's opinion which relate to those subjects, *e.g.*, the existence of "particularized need" for disclosure of grand jury transcripts and the existence of "special circumstances" which warranted disclosure of attorneys' work product (which, unlike privileged attorney-client communications, is entitled only to qualified protection against disclosure).

* The Court of Appeals declined to issue the writ to prevent disclosure of certain other memoranda for which defendants had claimed confidentiality on other grounds.

which the attorney-client privilege affords to corporate clients should be limited by the so-called "control group" test. In particular, the Court of Appeals said:

> "We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.
>
> "It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.
>
> "We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (Appendix A, p. 5a.)

In short, the Court of Appeals held that the so-called "control group" test unreasonably and improperly restricts the protection which the attorney-client privilege affords to communications between corporations and their attorneys, and concluded that

> "• • • because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communica-

tion is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (Appendix A, p. 5a.)

ARGUMENT

Plaintiffs urge here that certiorari should be granted because the decision of the Court of Appeals allegedly conflicts (1) with decisions of this Court and of other courts of appeals (particularly the Third Circuit) regarding the standards which govern the issuance of writs of mandamus, and (2) with a decision of the Tenth Circuit regarding the scope of the protection which the attorney-client privilege affords to communications between corporations and their attorneys.

As we shall show in Point I, *infra*, review of the issue with respect to the attorney-client privilege is not warranted at this time. As we shall show in Point II, *infra*, the granting of mandamus here was entirely consistent with principles often approved by this Court and by the courts of appeals.

I. THE DECISION BELOW IS IN ACCORD WITH THE OVERWHELMING WEIGHT OF AUTHORITY AND IS NOT IN GENUINE CONFLICT WITH ANY OTHER COURT OF APPEALS DECISION.

A. The Decision Below, Not the So-Called "Control Group" Test, Is In Accord With the Mass of Authority.

At the outset, the narrow scope of the decision below should be recognized. The opinion of the Court of Appeals expressly disclaims any effect on "the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe evidence which may generate liability on the part of the corporation" (Appendix A, p. 5a). The Court held the privilege applicable only

"where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (Appendix A, p. 5a.)

Despite these limitations, the petition extravagantly argues that "the Seventh Circuit's ruling conflicts with all relevant federal decisions regarding the scope of the corporate attorney-client privilege" (p. 13), and that "Judge Decker 'substantially followed' all relevant case law" (p. 9). That argument is patently in error.

The so-called "control group" test, on which plaintiffs rely, was first expounded in Judge Kirkpatrick's decision in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483 (E.D. Pa. 1962), petition for mandamus denied *sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir., 1962), cert. den. 372 U.S. 943 (1963). The doctrine has since been applied without reasoned analysis by the Tenth Circuit in *Natta* v. *Hogan*, 392 F.2d 686, 692 (1968), and by three federal district court judges.*

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* *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Cal., 1963); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 1970 CCH Trade Cases ¶ 73,122, March 27, 1970; and Judge Decker in the instant case. As will be demonstrated *infra*, p. 15, the other federal district court cases cited in the petition on this point did not involve the "control group" test and are clearly inapposite. We have found only one other reported case in which the "control group" test has been approved—*Day* v. *Illinois Power Company*, 50 Ill. App. 2d 52, 199 N.E.2d 802 (5th Dist., 1964), where the court did not attempt to rationalize its ruling, but merely followed *City of Philadelphia* and *Garrison* unquestioningly. A subsequent decision by a different district of the Illinois Appellate Court initially refers to the "control group" test with seeming approval, but then interprets that test in a manner which would reach the same result that was reached by the Court of Appeals on the facts here.

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In *Natta*, however, the briefs of the parties reveal that the corporate defendants did not deny, but on the contrary tacitly admitted, the existence and validity of the so-called "control group" test. They argued (unsuccessfully) *only* that the attorney-client privilege protected the confidentiality of the documents in question because each of those documents was a communication between a corporation's attorney and a member of the corporation's "control group". The court in *Natta* was asked to pass not upon the validity of the "control group" test, but only upon a disputed factual question—whether particular persons were members of the "control group" of the corporate defendant.* Consequently, there was no occasion for presentation of the authorities and reasons demonstrating why the "control group" test is unsound, and the court was not required to consider the pros and cons of that issue. Because the validity of the

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Golminas v. *Fred Teitelbaum Construction Co.*, 112 Ill.App.2d 445, 449-450, 251 N.E.2d 314, 318 (1st Dist., 1969). The court there said:

> "* * * For example, the principle underlying the attorney-client privilege would demand that an employee's communications *should be privileged when* [as here] *the employee of the defendant corporation is also a defendant or is a person who may be charged with liability* and makes statements regarding facts with which he or his employer may be charged, which statements are given or delivered to the attorney who represents *either* or both of them." (Emphasis supplied.)

* The corporate defendants in *Natta* expressly stated in their brief before the Court of Appeals that they were not questioning the trial court's "legal conclusions" regarding the attorney-client privilege:

> "Appellants have no quarrel with the legal conclusions reached in the opinion referred to [the trial court's opinion there], and assign no error therein. * * *" (Appellants' Br., p. 31.)

"control group" test was not in issue in that case, there is no genuine conflict between *Natta* and the decision below.

Moreover, the "control group" test has been rejected by the only court of last resort—the Supreme Court of California in *D. I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal. 2d 273, 36 Cal. Rptr. 468, 388 P.2d 700, 709 (1964)—which has given full consideration to the problem in recent years. In that case, adopting substantially the same rule as the Seventh Circuit did in this case, the California Supreme Court held that the attorney-client privilege protects the confidentiality of a communication between an attorney and an employee of his corporate client when the employee (a) "is required [to make it] in the ordinary course of the corporation's business," *or* (b) "when the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability)," *or* (c) when the communication relates to "the facts with which he or his employer may be charged," *or* (d) when, "under all circumstances of the case, [the employee] is the natural person to be speaking for the corporation."

That decision, like the decision below, was plainly in line with the mainstream of the law.* That the privilege ex-

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* **Federal cases**: *United States* v. *United Shoe Machinery Corporation*, 89 F.Supp. 357, 359 (D. Mass., 1950); *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Del., 1954); *Paper Converting Machine Co.* v. *FMC Corporation*, 215 F.Supp. 249, 251 (E.D. Wis., 1963); *United States* v. *American Radiator & Standard Sanitary Corp.*, 1958 Trade Cases ¶ 68,954 (W.D. Pa., 1958); *United States* v. *Aluminum Company of America*, 193 F.Supp. 251, 253 (N.D. N.Y., 1960); *United States* v. *Becton Dickinson & Company*, 212 F.Supp. 92, 93 (D. N.J., 1962); *Byers Theaters, Inc.* v. *Murphy*, 1 F.R.D. 286, 289 (W.D. Va., 1940).

State cases: *Schmitt* v. *Emery*, 211 Minn. 547, 2 N.W.2d 413, 416 (1942); *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107

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tends to communications between a lawyer and his client's agent, without limitation except that the agent be acting in that capacity, was recognized by Dean Wigmore (and Professor McNaughton) as recently as the 1961 Edition of Wigmore's treatise on *Evidence*, Vol. 8, § 2317 (McNaughton Rev., 1961).* Accord, 5 Jones, *Commentaries on Evidence* 4136 (1926). Similarly, the American Law Institute's *Model Code of Evidence* (1942) in Rule 210 (c) (ii) and the Uniform Rules of Evidence (approved by the Commissioners on Uniform State Laws and the American Bar Association in 1953) in Rule 26(3) provide that the privilege covers communications between the lawyer and "a repre-

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Atl.2d 527, 528 (1954); *Beach* v. *Oil Transfer Corporation*, 23 N.Y. Misc. 47, 199 N.Y.S.2d 74, 77 (Sup.Ct., Kings County, 1960); *Fire Association of Philadelphia* v. *Flemming*, 78 Ga. 733, 3 S.E. 420 (1887); *Brink* v. *Multnomah County*, 244 Ore. 507, 356 P.2d 536, 540 (1960); *Jessup* v. *Superior Court*, 151 Cal. App. 102, 311 P.2d 177, 180, 182-183 (1957); *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954); *Atlas Heating & Ventilating Co.* v. *Superior Court*, 208 Cal. App. 769, 25 Cal. Rptr. 532 (1962); *In re Hyde*, 149 Ohio 407, 79 N.E.2d 224, 227 (1948); *Robertson* v. *Commonwealth*, 181 Va. 520, 25 S.E.2d 352, 360 (1943); *Wise* v. *Western Union Telegraph Co.*, 36 Del. 456, 178 Atl. 640, 642 (1935); *Atlantic Coast Line R. Co.* v. *Williams*, 21 Ga. App. 453, 94 S.E. 584, 586 (1917); *Ex parte Schoepf*, 74 Ohio 1, 77 N.E. 276 (1906); *Davenport Co.* v. *Pennsylvania R. Co.*, 166 Pa. 480, 31 Atl. 245 (1895).

* Dean Wigmore declares that "* * * A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege. This of course includes * * * communications *originating with the client's agent* and made to the attorney." (Emphasis in original.)

See also *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 Northwestern U. L. Rev. 235, 241 (1961) ("It has long been recognized that the [attorney-client] privilege fully applies where the communication originated with an agent of the client").

sentative of the client", or "an authorized representative", without other limitation.

The petition alludes to the Preliminary Draft of the Proposed Rules of Evidence, prepared by the Advisory Committee on Rules of Evidence, which comes close to adopting the "control group" test (Rule 5-03(a)(3)) (Advisory Committee Note, p. 80). But that Draft, of course, is only the tentative version which it purports to be, made without the benefit of the comments and criticisms which the Advisory Committee itself has solicited. Not only is the content of the final recommendation to be made by that Committee (which, of course, now has before it the Seventh Circuit decision in this case) presently unpredictable; whatever final form that recommendation may take will have to be approved by the Standing Committee on Rules of Practice and Procedure, by the Judicial Conference, and by this Court before it can become effective. What Rule 5-03 will then provide on this issue is entirely conjectural. If anything, the fact that the Advisory Committee has the matter now under consideration affords an additional strong reason for denying review at this time.

B. The Decision of the Court of Appeals Comports With the Purposes Underlying the Attorney-Client Privilege, Which Would To a Substantial Extent Be Defeated Under the "Control Group" Test.

The interpretation of the privilege adopted by the Court of Appeals, rather than the "control group" test, best permits the public purposes of the attorney-client privilege to be achieved. As this Court has stated, "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well-known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were

required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915).

Almost 150 years ago, this Court, through Mr. Justice Story, declared that "it is indispensable for the purposes of private justice" that facts "communicated by client to counsel" in confidence should not be disclosed. *Chirac* v. *Reinicker*, 11 Wheat. (24 U.S.) 280, 294 (1826).* As numerous courts and commentators have recognized, the privilege encourages "freedom of consultation" by removing "the apprehension of compelled disclosure by the legal advisers" (8 Wigmore, *Evidence*, § 2291 (McNaughton Rev. 1961)).

The privilege extends to corporations as well as individual clients (*Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir., 1963), cert. denied, 375 U.S. 929 (1963)). Outside of the "control group" cases, the privilege has long been held to cover communications from a client's agents as well as from the client himself, as we have shown *supra*, pp. 9-11.

For the privilege to be effective, it must—and does—apply both (1) to the advice given by the attorney in confidence and (2) to the statements made by the client (or by his agent) to the attorney upon which the attorney's advice or service necessarily is predicated. It applies to the spoken as well as to the written word. It applies to legal advice for whatever purpose sought. Plaintiffs' argument limits itself to a discussion of the privilege in the context of a statement made to an attorney and reduced to writing in the course of providing legal advice and service with re-

* To the same effect, see *Blackburn* v. *Crawfords*, 3 Wall. 175, 192-193 (1865); *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

spect to litigation, pending or potential. But the scope and significance of the decision here under consideration is not so limited.

It is fair to say that application of the "control group" test would in major part destroy the protection provided by the attorney-client privilege to the modern corporation, and in turn would deprive the public of the benefit which it receives when a corporation's policies and procedures are based on well-informed legal advice. Plaintiffs have made no effort to deny this.

Effective use of legal advice requires that it be made available to all those persons whose actions it is intended to guide. A modern corporation, depending upon its size, may act through and be bound by the actions of hundreds or thousands of persons, few of whom have the power to control or determine what the company should do on the basis of its lawyer's advice. Any of them, however, may be equally in need of adequate legal advice with respect to conduct for which the company may be liable. The action of a purchasing agent or a salesman, for example, is more apt to place a corporation in violation of the Robinson-Patman Act than is the action of the president of a company. If it is in the public interest that persons, including corporations, be entitled to receive legal advice in confidence in order to prevent such violations, then it clearly is in the public interest that those who can benefit most from the advice should be able to receive it on a privileged basis.

The same principle applies with respect to attorneys' efforts to obtain information upon which to base legal advice. In order to give informed legal advice, the attorney must have not only knowledge of the law but also knowledge of the facts to which the law is to be applied. The privilege rests on the long accepted belief that it is in the public

interest that clients should be permitted to convey in confidence information upon which legal advice is to be predicated; obviously the information should come from those who are in the best position to provide it in complete and accurate form. The instances in which members of a corporation's "control group" could be expected to have complete firsthand knowledge of the facts needed by counsel will be rare indeed. If the attorney-client privilege is to serve a useful purpose in protecting this flow of information, it must protect attorneys' communications with those persons who have firsthand rather than, at best, hearsay knowledge of the pertinent facts. Under the "control group" test, however, most of the persons whose conduct is binding upon the corporation could not communicate confidentially with the corporation's attorney about the acts which they performed on its behalf and for which it is liable. Indeed, application of the "control group" test would mean that whatever such persons tell the company lawyer to enable him to advise and defend the company might have to be disclosed *by him* to the company's adversaries—perhaps even as a witness against his own client.

Thus, in every important respect application of the "control group" test would serve to defeat a basic purpose of the corporate attorney-client privilege—to encourage corporations to obtain reasoned and soundly based legal guidance in order that they may comply with the law. If full and frank discourse between client and attorney is in the public interest, application of the "control group" test is scarcely the means to accomplish that end.

The position taken by the Court of Appeals here, like that of the California Supreme Court in *Chadbourne, supra*, p. 9, accords the privilege the scope which it must have to achieve its purpose. It distinguishes between situations in which the attorney's advice is sought with respect to the employee's performance of his corporate duties and functions,

and those in which the employee may be a mere witness, as in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947).*

This gives rational content to the concept of agency implicit in the pre-1962 authorities: namely, that the privilege applicable to communications between an agent and his principal's attorney should reach only statements which relate to the agent's duties as such on behalf of the principal. In contrast to the "control group" test, this interpretation of the privilege by the Court of Appeals is consistent with, and serves to effectuate, the public purposes underlying the privilege, and does not call for review by this Court.

The petition makes little or no effort to advance reasons

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* In *Hickman*, this Court, specifically declining "to delineate the control and scope of the privilege," held only that "the privilege does not extend to information which an attorney secures from a witness * * *." (p. 508). Although it appeared there that some of the witnesses interviewed were employees of the attorney's client, there was no indication that they had any duties on behalf of the client with respect to the accident in question (p. 498). By contrast, in the instant case the communications in question dealt with the employees' performance of their duties, and the decision of the Court of Appeals here was based in large part on that factor (Appendix A, p. 5a).

The other cases cited by plaintiffs are likewise inapposite. *Humphries* v. *Pennsylvania R. Co.*, 14 F.R.D. 177, 179 (N.D. Ohio 1953), also involved statements by mere witnesses. In *Rucker* v. *Wabash R.R. Co.*, 418 F.2d 146, 154 (7th Cir. 1969), the opinion notes that "the statements do not appear to have been taken by the attorneys, but by investigators employed by the parties or their insurers" (418 F.2d at 154). Similarly, in *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 4647 (S.D.N.Y. 1951), the court emphasized the fact that the record did not show that the witnesses' statements in question were taken by *defendant's attorney*, and concluded that there apparently was not "any basic professional relationship" between the defendant and the individual who procured the witnesses' statements.

why the "control group" theory constitutes a sound rule of evidence. Plaintiffs' argument, apart from reliance upon the few "control group" cases as authority, is in essence that plaintiffs in private antitrust cases will be aided by having access to statements made by company officials to company attorneys, particularly when the communications are made long before the subsequent discovery or trial, when recollections inevitably are less vivid or accurate. This is, of course, true. It will always be helpful for any litigant to have access to confidential communications between his opponent and the opponent's attorney. In dealing with a similar argument in *Hickman* v. *Taylor*, 329 U.S. at 507, this Court admonished that "framing the problems in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory." The problem, in this case as in that one, "far transcends" such situations, and must be viewed "in light of the limitless situations" to which the test espoused by plaintiffs would apply.

No one has suggested seriously, however, that the scope of the attorney-client privilege is different in antitrust cases than in other areas of the law, or that a special rule should be devised to aid antitrust plaintiffs. The privilege rests upon broader considerations of public policy which, as for all of the recognized privileges, "outweigh the harm that may come from the suppression of the evidence in specific cases." American Law Institute, *Model Code of Evidence* (1942), Comment to Rule 210, p. 147.

Moreover, the attorney-client privilege, when viewed in perspective, does not suppress the truth. It does not preclude a litigant from resorting to any source of information which would have been available if his adversary had not consulted an attorney, or from obtaining all relevant information from the persons having knowledge of the facts,

either in discovery or at trial. This includes the right to interrogate the opposing party or his agents or employees in depositions, and, as here, even to have access to the grand jury testimony of such persons. Thus the practical result of holding the privilege inapplicable is not to make existing or available information inaccessible, but merely to create another possible source of information—the lawyer—which but for the privilege might not exist. The principal effect of holding that the privilege applies thus would not be to create a barrier to discovery of the facts, but to encourage the full and candid disclosure to lawyers which is essential to effective representation and to the giving of useful legal advice.

The petition also asserts that the Seventh Circuit rule is ambiguous, unworkable and so confusing as to hamper private enforcement of the antitrust laws. Suffice it to say that that rule is far less difficult to apply than the "control group" test itself, and the opinion of the Seventh Circuit is much more explicit than earlier decisions which have tended to discuss the privilege in general rather than specific terms.*

II. THE GRANTING OF MANDAMUS WAS AN APPROPRIATE EXERCISE OF DISCRETION BY THE COURT OF APPEALS.

It is of course clear that not every wrongful exercise of discretion or every incorrect ruling on a legal question

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* The petition suggests (p. 16) that the law of the forum state —here, Illinois—controls matters of privilege. But the two Illinois Appellate Court cases cited in the petition would differ on their application of the attorney-client privilege to the facts here involved. See fn., pp. 7-8, *supra*. In general, and apart from the "control group" cases themselves, the scope of the privilege has been the same in state and federal courts, as appears from the authorities cited *supra*, pp. 9-10, fn.

justifies the use of mandamus as a means of obtaining review of an interlocutory order. This Court has, however, often recognized—in the cases cited in the petition, *inter alia*—that in exceptional situations mandamus may properly issue "to confine an inferior court to a *lawful* exercise of its prescribed jurisdiction." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112 n. (1964); *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 245 (1964); *Will* v. *United States*, 389 U.S. 90, 95 (1967), all quoting from *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26 (1943). Indeed, this Court's decisions establish that mandamus, on occasion, may issue even to correct "a clear abuse of discretion." *Schlagenhauf, supra*, at p. 111; *Bankers Life, supra*, at p. 383; *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957).

The use of the writ to correct an error of law manifestly is appropriate when the matter is of great importance to the litigants or to the public interest, or (as here) to both, and no other adequate remedy is available. Thus, mandamus has issued to correct interlocutory rulings which misinterpreted a rule of court (*Schlagenhauf, supra; Atlass* v. *Miner*, 363 U.S. 641, 649 (1960)), employed an inappropriate criterion or relied on improper factors in applying a statute (*Platt, supra; Dairy Industries Supply Ass'n* v. *LaBuy*, 207 F.2d 554, 558 (7th Cir., 1953)), or failed to heed a non-statutory principle of international law (*Ex parte Peru*, 318 U.S. 578 (1943)).

Obviously, no litmus test is available by which conformity to the above general principles can be determined. This Court has often stated, and plaintiffs conceded before the Court of Appeals (Answer to Petition for Mandamus, p. 16), that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the

Court" (Ex parte Peru, supra, at p. 584; *Schlagenhauf, supra,* at p. 112 n.). Similarly, in *LaBuy* v. *Howes Leather Co., supra,* at p. 260, this Court said that "The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." See also 6 Moore, *Federal Practice,* § 54.10[4], pp. 87-88.

In the exceptional circumstances presented here, and given the Court of Appeals' wide range of discretion, there is no reason for this Court to undertake further review of its decision. Indeed, the care exercised by the Court of Appeals is demonstrated by its refusal to issue mandamus with respect to any aspect of the trial court's decision which involved an element of discretion, whether or not it agreed with the trial court's action in that respect (see Appendix A, pp. 6a-7a). Whether the attorney-client privilege is to be limited by interjection of the "control group" test, however, obviously is a question of law, not of trial court discretion.*

Nor was any other effective remedy available to defendants with respect to the trial court's ruling. The trial court had barred other avenues of appellate relief by refusing certification under 28 U.S.C. § 1292(b), and by refusing a request that the 17 attorneys' memoranda be returned to defendants' counsel, so that counsel would have an opportunity to challenge the propriety of the trial court's order through contempt proceedings (if they chose to do so). Thus if the Court of Appeals had not issued its writ

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* Plaintiffs' intimation (Petition, p. 10) that "mandamus is an especially inappropriate remedy for review of discovery orders within the discretion of the trial judge" is entirely inapposite, since the Court of Appeals here clearly did *not* issue mandamus with respect to any discovery order "within the discretion of the trial judge".

of mandamus, the privileged documents would have been turned over to the plaintiffs immediately, and the privilege would have been lost irretrievably. As a practical matter, such an error cannot be rectified years after the confidential information has been disclosed, even if a reviewing court finally determines, after trial, that the documents were privileged.

In a number of cases this Court and the courts of appeals have granted mandamus to correct misinterpretations of important statutes or rules of court. See cases cited *supra*, p. 18. There is no less reason for granting mandamus when a trial court threatens to emasculate a common law rule which was universally accepted until 1962, and which only a handful of courts have failed to follow since that date. The impact of the "control group" test upon the public interest in enabling attorneys to provide legal service on the basis of candid disclosure of the relevant facts is far more pervasive and significant than the impact of the issues which were presented in many of the decisions which this Court has held were properly overturned by writs of mandamus—whether Rule 35 permits a court to order a physical examination of a defendant as well as of a plaintiff *(Schlagenhauf, supra)*, when masters can properly be used *(La Buy v. Howes Leather Co., supra)*, what factors should be considered in applying 28 U.S.C. § 1404(a) *(Platt, supra)*, or even whether discovery depositions are proper in admiralty cases *(Atlass, supra)*.

Indeed, this Court and the courts of appeals have held that mandamus was an appropriate remedy in many discovery situations—to vacate an order requiring a defendant (a bus driver whose allegedly poor vision had caused an accident) to undergo a physical examination *(Schlagenhauf, supra)*, to overturn a trial court order granting claimants in an admiralty action leave to take certain spec-

ified depositions for discovery purposes only (*Atlass, supra*), to overturn an order restricting the scope of the attorney-client privilege (in another respect) as grounds for approving grand jury subpoenas which sought disclosure of attorneys' memoranda virtually identical to those involved here (*Continental Oil Co.* v. *United States*, 330 F.2d 347, 349 (9th Cir., 1964)), and to prevent disclosure of a trade secret (*Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9th Cir., 1961)).

In the Second Circuit's recent decision in *American Express Warehousing Co.* v. *Transamerica Insurance Co.*, 380 F.2d 277 (2d Cir., 1967), relied upon in the petition (pp. 10-11), all three Court of Appeals judges recognized that mandamus might have been appropriate if the "interesting question" as to "whether work-product extends to work done by agents of an attorney" (p. 283) (a question not dissimilar from that involved here) *had actually been decided below*. The majority there denied the writ, however, because the District Court did not "reach this interesting question." Chief Judge Lumbard, dissenting, would have granted the writ on the ground that mandamus was an appropriate vehicle for determining, for the guidance of the district courts in that Circuit, an important question as to which the authorities were not in harmony.

The *Schlagenhauf, Atlass, Hartley Pen, Continental Oil* and *American Express* cases are examples of judicial recognition that mandamus may properly be granted to correct an unlawful exercise of authority in connection with discovery when the questions of law are of substantial public importance and no other remedy is available.

Plaintiffs here contend (Petition, pp. 8, 12) that the granting of mandamus by the Seventh Circuit conflicts with the Third Circuit's denial, in *City of Philadelphia, supra*,

of an application for prohibition or mandamus to review Judge Kirkpatrick's decision adopting the "control group" test. The reasons for the Third Circuit's bare *per curiam* order denying that application (by a two-to-one vote, Chief Judge Biggs dissenting) are, of course, unknown. In that case, however, Judge Kirkpatrick had found (210 F.Supp. at 484, 486) that the corporation's lawyer had advised the employee that "if it should turn out that they [the employee's disclosures] revealed a violation of written company policy directives, the lawyer would 'report that fact to management,' * * * thus sharply differentiating the witness from 'the management,' meaning, of course, the corporation." This, Judge Kirkpatrick found, disposed of "any possible claim that the communications were confidential" (p. 484). The "control group" test thus was actually unnecessary to Judge Kirkpatrick's decision. The facts referred to in the above quotation, which are not present here, may well have been the basis for the Third Circuit's summary denial of the writ. In any event, it is well-settled that mandamus "may be granted or withheld in the sound discretion of the Court" *(supra,* pp. 18-19). Clearly, then, the exercise of discretion to grant the writ in one case can scarcely be regarded as being in conflict with another court's unexplained exercise of discretion to deny the writ in another case.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

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FILED
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JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 113

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UNITED STATES DISTRICT JUDGE, et al.,

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vs.

HARPER & ROW PUBLISHERS, INC., et al.,

Respondents.

REPLY BRIEF OF PETITIONERS

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The Scheffer Press, Inc.—ANdover 3-6850

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Respondents.

REPLY BRIEF OF PETITIONERS

I. THE SEVENTH CIRCUIT'S OPINION IRRECONCILABLY CONFLICTS WITH THE CONTROLLING DECISIONS OF OTHER CIRCUITS.

Defendants concede the existence of a conflict among decisions with respect to the proper scope of the attorney-client privilege. Accordingly, defendants have sought to dismiss the cases adverse to their position as not well reasoned,[1] and devote much of their brief to the substan-

[1] Defendants argue that *Natta* v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968), should be rejected because "the validity of the 'control group' test was not an issue in that case." (Brief in Opposition, pp. 8-9). The premise for this argument is simply not accurate. Defendants have misled this Court by failing to advise that the appellees in *Natta* v. *Hogan* challenged the control group test as affording too broad a privilege, and placed its application squarely in issue before the Court of Appeals. (Appellees' Br., pp. 32-33, 35).

tive issues involved. The plaintiffs, of course, intend to present the merits of this case at the appropriate time.

The need to resolve the conflict that now exists in the federal system with respect to the proper limits of the corporate attorney-client privilege has become even more compelling because of the decision in *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 1970 CCH Trade Cases ¶ 73,122 (M.D. Pa., March 27, 1970), subsequent to the filing of this petition for certiorari. The conflict among the circuits appears quite sharply in *Honeywell* since Chief Judge Sheridan adopted the control group test, expressly relying on *Natta* v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968), and declined to follow *Harper & Row Publishers, Inc.* v. *Decker*, ... F. 2d ..... (7th Cir. 1970), noting the difficulties in trying to apply the Seven Circuit's test. The *Honeywell* opinion reasoned as follows:

> "Insofar as a corporation is concerned, only communications between counsel and the corporation's 'control group,' who are in effect *the clients*, are within the purview of the privilege. *Natta* v. *Hogan*, 10 Cir. 1968, 392 F. 2d 686. In determining what officers and employees of a company asserting a privilege speak for the company within the meaning of 'client,' the test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on advice of counsel, or is an authorized member of a group that has this power. *Natta* v. *Hogan*, supra. A research chemist and a group leader in a research and development department have been held not to be within the control group. *Hogan* v. *Zletz*, N.D. Okla. 1967, 43 F.R.D. 308, modified on other grounds sub nom. *Natta* v. *Hogan*, 10 Cir. 1968, 392 F. 2d 686. . . . One who claims the benefit of privilege should bear the burden to demonstrate that the privilege exists. *Camco, Inc.*

v. *Baker Oil Tools, Inc.*, S.D. Texas 1968, 45 F.R.D. 384. Plaintiff has not met this burden."

Thus, not only does the Seventh Circuit's opinion admittedly conflict with the law in the Tenth Circuit, and decisions of district courts in the Ninth and Second Circuits,[2] but the *Honeywell* decision reaffirms the vitality of the control group test enunciated in *City of Philadelphia* v. *Westinghouse Electric Co.* as the law in the Third Circuit.

The suggestion by defendants that these conflicts should be resolved by the Advisory Committee on the Rules of Evidence, subject to pressure from counsel wishing to change Rule 5-03(a)(3),[3] points up the need for this Court to exercise jurisdiction to consider and decide this issue. The supervision and control of the federal courts with respect to rulings on discovery and matters of privilege should be reserved to this Court, acting in the context of a fully litigated case.

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[2] A general recital of older cases applying the doctrine of corporate attorney-client privilege (Brief in Opposition, pp. 9-10) cannot obscure the fact that the federal courts, without exception, have applied the control group test to define the appropriate limits of the corporate attorney-client privilege since adoption of that test in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483 (E.D. Pa. 1962), petition for mandamus denied *sub. nom. General Electric Co.* v. *Kirkpatrick*, 312 F. 2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). Completely lacking any support in federal decisions, defendants place particular stress upon *D. I. Chadbourne* v. *Superior Court*, 388 P. 2d 700 (Cal. 1964). Yet that decision denied mandamus relief with respect to the trial court's discovery order and concluded that there was no showing that the statement of the interviewed employe "emanated from him in his capacity as a spokesman for the corporation" or that he spoke with any intention or expectation of confidentiality. (At 708-711)

[3] Brief in Opposition, p. 11.

II. THE EFFECTIVE ADMINISTRATION OF MULTI-DISTRICT LITIGATION UNDER 28 U.S.C. § 1407 REQUIRES THIS COURT TO RESOLVE THE CONFLICTS CREATED BY THE SEVENTH CIRCUIT'S OPINION.

The elimination of conflicts among the circuits as a reason for granting certiorari in this case takes on added significance in view of the disruptive effect that the Seventh Circuit's decision will have upon the special rules for consolidation and coordination of multi-district litigation under 28 U.S.C. § 1407. That statute provides:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . ."

Applying this statute, the Judicial Panel on Multi-District Litigation has held that "the pretrial powers of the transferee court include the powers to modify, expand, or vacate earlier discovery orders." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 489 (J.P.M.L. 1968). Section 1407 has been interpreted to require that all issues arising in pretrial proceedings be decided by the transferee court "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *Id.* at 491-492; *In re Antibiotic Drug Cases*, 299

F. Supp. 1403, 1405-1406 (J.P.M.L. 1969). The Judicial Panel has stressed this need for uniformity with respect to rulings on availability of evidence. *In re Plumbing Fixture Cases*, CCH Trade Cases ¶ 73,031 (J.P.M.L. 1970), pp. 88,035-88,036.

Consequently, the confusion created by the Seventh Circuit's opinion necessarily means that litigants in the numerous and growing number of multi-district antitrust and other complex cases, such as this one, will be subjected to different rules of law depending upon the district court before which their cases are consolidated for pretrial discovery purposes. Indeed, the parties may be precluded from essential discovery even though the control group test would be followed by the district court where the complaint was filed and where the case will ultimately be returned for trial.

Moreover, the existence of this conflict with respect to the scope of the corporate attorney-client privilege undermines the "just and efficient conduct" of multi-district litigation that Section 1407 seeks to achieve. The Judicial Panel's choice of forum to supervise and control pretrial discovery proceedings in multi-district cases should not be affected by the prospect of differences in crucial rules of law with respect to discovery.

III. DEFENDANTS' ARGUMENTS IN FAVOR OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE ARE NOT PERTINENT TO THE FACTUAL CIRCUMSTANCES OF THIS CASE.

The defendants have sought to gloss over the absence of any factual basis for their claims of corporate attorney-client privilege by an extended, hypothetical and irrelevant discussion of "public interest." The evidence of this

case demonstrates beyond any doubt that the debriefing interviews were conducted solely to gather facts as to what occurred before the grand jury during the pendency of that investigation. The attorneys involved did not render any legal advice to the witnesses interviewed about the conduct of their business or their corporation's business, but simply sought to discover what questions were asked in the grand jury, what areas of investigation were being pursued by the federal government, and who else had testified before the grand jury and the like. The fact that some of the witnesses interviewed may have been employees of the defendants did not change the purpose for which they were questioned.

Respectfully submitted,

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No. 113

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For the Seventh Circuit

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1337

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

Petitioners' reply brief (p. 1, n. 1) charges that "defendants have misled this Court" in stating that the validity of the "control group" test was not in issue in *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir., 1968), because; according to petitioners, the *appellees* in *Natta* (rather than the appellant corporation) allegedly "challenged the control group test * * * (Appellees' Br., pp. 32-33, 35)."

In the cited portion of their brief in *Natta* the appellees (and cross-appellants), who as beneficiaries of the "control group" test were allowed access to a number of documents as to which privilege had been claimed, first quoted from

earlier "control group" cases. They then suggested that they were entitled to examine additional documents on the ground that the attorney-client privilege does not apply to communications *from* an attorney to a client (even to "control group" members), and also on the ground that an even broader exception to the attorney-client privilege should be recognized for communications involving patent attorneys. None of the parties in the *Natta* case suggested that the "control group" test unduly *narrowed* the privilege. Accordingly, *that point*, which is all that is involved here, was not in controversy in *Natta;* see our brief in opposition (pp. 8-9).

The pertinent pages of the appellees' brief in *Natta* are attached as an Appendix hereto.*

Respectfully submitted,

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On behalf of Respondents

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April 24, 1970

---

* Petitioners do not deny that the brief of the *appellant corporation* in *Natta* did not question, or even discuss, the soundness of the "control group" test.

APPENDIX

Pertinent pages from the brief of appellees in Natta v. Hogan, 392 F.2d 686 (10th Cir., 1968)

4. Corporate Privilege, Confidentiality and the Control Group Concept

In *Radiant Burners, Inc.* v. *American Gas Association*, 320 F. 2d 314 (7 Cir. 1963), upon which the court below extensively relied, the Seventh Circuit, sitting *en banc*, reversed a *nisi prius* decision foreclosing privilege to corporations, *inter alia*, on the ground that:

> " . . . since secrecy or confidentiality is essential to a claim of the privilege in any event, it is not possible to maintain this relationship because of the possibility of disclosure to persons who constitute or are necessarily related to the corporate entity. . . ." 320 F. 2d at 317.

On this issue of confidentiality, the Seventh Circuit stated:

> "Where a corporation is the client it must act through its officers and agents. The character of the corporate organization and management will vary from the small, family type, one-man variety to the giant with its thousands of employees. The problems concerning confidentiality will necessarily vary accordingly. Judge Wright took note of these difficulties in American Cyanamid Company v. Hercules Powder Company, D.C. D.Del., 211 F. Supp. 85, 88 (1962). Judge Leahy competently met the problem in Zenith Radio Corp. v. Radio Corp. of America, D.C.D.Del., 121 F. Supp. 792 (1954), as did Judge Wyzanski in United States v. United Shoe Machinery Corporation, D.C. D.Mass., 89 F. Supp. 357 (1950) . . . ." 320 F. 2d at 323-324.

As the Seventh Circuit in *Radiant Burners* also recognized, subsequent to the district court decision in the same case, the "control group" concept for limiting the scope of corporate privilege in deference to the privilege prerequisite of confidentiality was evolved in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962). While rejecting the blanket repudiation of corporate privilege espoused by the lower court in *Radiant Burners*, the Pennsylvania Court, recognizing the Wigmore essential also espoused by Judge Daughterty and appellants (Br. 31) that a communication, to be privileged, must be "*by* the client" "*to* a professional legal adviser in his capacity as such", stated:

> " . . . the most satisfactory solution, I think, is that if the *employee making the communication*, of whatever rank he may be, *is in a position to control* or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personi-

fies) the corporation when *he makes his* disclosure *to* the *lawyer* and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice . . . Of course . . . the authority of the person *speaking with the lawyer* to participate in contemplated decisions must be *actual* authority. . . ." 210 F. Supp. 483, 485.

The court rejected the suggestion that "the . . . rank of the employee making the communication" be used "as a guide", concluding that "The trouble with that is that in corporate terminology the same title does not always mean the same thing. Manager, executive, officer—these are not clearly defined terms." 210 F. Supp. at 485.

After *City of Philadelphia* came *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963), a patent case. In *Garrison*, the district court, somewhat arbitrarily, found a *production* division manager and his chief engineer to constitute members of a "control group" (significantly *no* patent department employees were included) —and thus tended to follow the "rank" approach critized in *City of Philadelphia*. The court in *Garrison*, however, was careful to preserve the integrity of the rule that to be privileged the communication must be *by* the client *to* the attorney.

Judge Daugherty apparently relied upon *Garrison*, which he characterized on March 30 as "the 'control group' case" (R. 67), to *sustain* privilege for four of the documents here in issue. In his final opinion filed June 26, 1967, under the heading "Attorney-Client Privilege (Documents 1 through 13 incl.)", Judge Daugherty stated:

". . . Communications between attorneys in the Patent Division of Phillips Petroleum Company *are not* considered to be communications between attorney and client. The manager [Mr. Arthur Young, said to be an attorney] and assistant manager [Mr. John Paul Jones, also said to be an attorney] of the Patent Division and the manager and assistant manager of the Research and Development Department and the members of the Patent Committee of Phillips Petroleum Company are deemed to be within the 'control group' of said company. A research chemist and a group leader in the Research and Development Department of Phillips Petroleum Company are not deemed to be within the 'control group' of said company. Therefore, communications between an attorney and the managers and assistant managers above mentioned and the Patent Committee are between attorney and client and *are* privileged if they constitute legal advice." (R. 74; inserts and emphasis added.)

5. The Error as to Privilege

As the actual rulings demonstrate, the district court cast attorney-manager Young and attorney-assistant manager Jones of the Phillips patent division in their true role as patent attorneys to deny privilege for communications by (from) them in that capacity. See the rulings denying privilege for documents 1, 4 and 6 (R. 74-76).

Conversely, the district court arbitrarily cast these same patent attorneys in the hypothetical role of "control group" members (*i.e.*, the "client"), presumably because of their title or "rank", to sustain privilege as to communications *to* them from other attorneys in the patent division. It was on this ground alone that privilege was sustained as to documents 2, 9, 10 and 12.

Even if the finding that attorneys Young and Jones are "control persons" were supported by the record—and it is not [37]—the privilege must fail. In each case, as Judge Daugherty in fact found, the communication in question is "*from* [not to] an attorney and *to* [not from] a 'control person' (client)" (emphasis and inserts added). In each case, "the person making the communication" is *himself* the *lawyer* (*not* the *client* as Wigmore requires) who has not been and cannot be shown to be in a "position to control . . . any action which

---

[37] The sole evidentiary record with respect to the organization and personnel of the Phillips Petroleum Company patent division is the partisan affidavit of L. Malcolm Oberlin, one of its members, filed on or about January 4, 1967. This partisan affidavit is silent with respect to the actual authority of any of the individuals, including Messrs. Young and Jones, to which it adverts.

There neither was nor could have been any finding below that either Mr. Jones or Mr. Young "executed executive responsibilities in their work" (Br. 31, 32) because there was no evidence before the court on which such finding could have been made. The Oberlin affidavit contains no such averments.

Insofar as the characterization of the documents is concerned, Natta is sorely handicapped because counsel for Natta have never seen the documents, nor had an opportunity to examine or cross-examine any person having knowledge of the documents, the facts attending their preparation, their distribution or content. Under the proceedings conducted below, counsel for Natta were not informed as to which documents fall into which of the appellants' groups. The total record with respect to the nature of the documents, their preparation, distribution and content, consists of (a) the documents themselves which were considered by the district court and (b) the partisan "affidavit of L. Malcolm Oberlin, an attorney with the Patent Division of Phillips. . ." which must be rigorously construed against the appellants, particularly since Natta had no access to contrary or additional facts and no opportunity to cross-examine. The court was also supplied with a list prepared by appellants' counsel and purporting to classify the documents under the headings "date", "type of document", "author", "addressee" and "copies shown to". A copy of this list which, of course, is not evidence and which apparently is *not* in all respects consistent with the findings of the district court as to documents 1 to 13 was forwarded to the Clerk of this Court by the clerk of the district court pursuant to stipulation.

the corporation may take upon [*his*] advice". The opinion below is thus at odds with the very authorities including Wigmore and the decisions in *City of Philadelphia* and *Garrison* upon which it purports to rely.[38]

Such secondary criteria as whether attorneys Young and Jones were properly designated members of a hypothetical control group, distinctions between "house counsel" and "outside counsel" and the predominantly business and technical nature of work of corporate patent division activities, while, on balance, they clearly foreclose privilege in this case, do not in any event afford the true basis for decision.

The issue should have been resolved on the basis of the policy behind the privilege. The question is whether extending the privilege to corporate patent procurement documents will promote that policy and whether, when balanced against the competing policy of accuracy in fact-finding as reinforced by the dominant public interest in patents, the policy of the privilege should prevail. As the preceding portions of this brief demonstrate, in the limited context of the documents here in issue, privilege is, in logic and law, foredoomed.

These same considerations are dispositive of the appellants' contention that the court erred in refusing to extend privilege to documents 1, 3, 5, 7 and 8.

Judge Daugherty found that document 1 is a "Memorandum" dated "(a) May 14, 1952" written by "(b) J. Paul Jones (attorney-asst. mgr. patent division) to (specific addressee-client unidentified)". (R. 74). On these facts, the district court properly concluded as a matter of law "(d) this memorandum is *not* privileged because it does *not* appear to be a communication between attorney-client" (R. 74).

In view of Philips' concessions concerning its nature (Br. 32), Judge Daugherty obviously recognized that as to this communication Mr. Jones was acting in his *true* role as a patent division attorney—*not* as a hypothetical "control person". Hence the document could *not* be privileged under the basic rule, enunciated by the court and accepted by appellants, that "Communications between attorneys in the Patent Division . . . are not . . . communications between attorney and client" (R. 74)—as indeed the court literally held.

[38] To the extent that the opinion below is, as it states on its face, based on the conclusion that the letters in question contain "legal advice", it is in error. It is axiomatic that privilege applies not to *advice*, but only to the facts upon which the advice is premised.

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 113

BERNARD M. DECKER, United States District Judge, et al.,

Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC, et al.

Respondents.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1970
CERTIORARI GRANTED MAY 4, 1970

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APPENDIX

DATES ON WHICH RELEVANT PLEADINGS WERE FILED, HEARINGS CONDUCTED AND ORDERS ENTERED

July 28, 1969

Filing of Plaintiffs' Motion for Production of Documents and Supporting Affidavit.

August 7, 1969

Hearing before Judge Decker with respect, inter alia, to Plaintiffs' Motion for Production of Documents.

August 7, 1969

Order by Judge Decker directing that defendants file under seal those documents requested by plaintiffs' July 28, 1969 Motion which defendants contend are protected by the attorney-client privilege and/or the work product doctrine, "accompanied by a precise factual statement setting forth the circumstances under which [each such] document was prepared," and establishing a briefing schedule with respect to defendants' claims of attorney-client privilege and work product protection.

August 21, 1969

September 22, 1969

Filing of factual statements called for by Judge Decker's August 7, 1969 Order, and briefs with respect to defendants' claims of attorney-client privilege and work product protection.

September 25, 1969

Hearing before Judge Decker with respect to defendants' claims of attorney-client privilege and work product protection.

October 7, 1969

Judge Decker's Memorandum Opinion with respect to defendants' claims of attorney-client privilege and work product protection.

October 17, 1969

Hearing before Judge Decker on defendants' motion that his ruling with respect to defendants' claims of attorney-client privilege and work product protection be certified for appeal under 28 U.S.C. § 1292(b).

October 17, 1969

Order by Judge Decker implementing his opinion of October 7, 1969 with respect to the claims of attorney-client privilege and work product protection, and denying certification.

October 20, 1969

Filing of Petition for Writ of Mandamus and Emergency Motion for Stay.

October 20, 1969

Order of Seventh Circuit granting emergency motion for stay.

November 6, 1969

Filing of Answer to Petition for Writ of Mandamus.

February 4, 1970

Opinion of Seventh Circuit, and order implementing that opinion.

March 11, 1970

Order of Seventh Circuit clarifying opinion of February 4, 1970.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

STATE OF ILLINOIS, et al., Plaintiffs v. HARPER & ROW PUBLISHERS, INC., et al., Defendants		No. 67 C 1899 And Related Cases

PLAINTIFFS' MOTION FOR PRODUCTION OF DOCUMENTS UNDER RULE 34

Plaintiffs hereby move this Court for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure requiring all defendants in these consolidated proceedings to produce and to permit the plaintiffs to inspect and copy, or cause to be copied, the documents specified below that are now in their possession, custody or control. It is requested that for each document the paragraph of the motion in response to which it is produced should be indicated.

Definitions

"Defendants" shall mean the corporate defendants named in the pending treble damage complaints, their predecessors, subsidiaries, affiliates, divisions and branches thereof, wherever located, and by whatever trade name known; and all officers, directors, sole proprietors, partners, owners, employees, agents, representatives, or any person owning any interest in, having any position with, or employed by defendants.

Except where otherwise stated, "document" shall mean any written, recorded or graphic matter, however produced or reproduced, prepared during the period from January 1966 to July 1969, inclusive, wherever located,

whether in the possession, custody or control of the defendants or of any official, employee or agent of the defendants, including documents which did not leave the possession of the person who prepared them, including copies where originals are not available. Unless otherwise specified, the documents found by the defendants are to be produced instead of newly made copies thereof.

"Wholesaler" shall mean any person or company which buys books from publishers and resells them to schools, libraries, governmental bodies, or bookstores.

"Library editions" shall mean children's books in special library bindings, or children's books in reinforced bindings sold primarily to schools and libraries, or children's books which have a "net price."

"Trade editions" shall mean children's books which are not "library editions."

Documents to be Produced
by all Defendants

1. All memoranda, reports, summaries, notes, and correspondence which refer or relate to the testimony of any employee or former employee of the defendants in connection with the grand jury investigation instituted in the Northern District of Illinois, docketed as 66 G.J. 3003, which led to the filing of civil complaints on April 18, 1967, against eighteen publishers of library editions of children's books.

2. All discount schedules relating to the sale of trade editions or library editions of children's books to wholesalers for the years 1966, 1967, 1968 and 1969.

3. All schedules, announcements, bulletins or lists indicating the prices and/or terms upon which defendants offered or sold trade editions, or offered or sold library editions of children's books to schools and libraries during the years 1966, 1967, 1968 and 1969.

4. All documents, reports and memoranda prepared during the years 1966 through 1969, inclusive, which refer or relate, in whole or in part, to:

(a) the pricing policy of the defendants or other publishers or wholesalers for the sale of trade editions, or for the sale of library editions of children's books to schools and libraries;

(b) the discount policy of the defendants or other publishers for the sale of trade editions, or for the sale of library editions of children's books to wholesalers;

(c) reports from salesmen about the practices of other publishers or wholesalers and/or the prices charged by other publishers or wholesalers on the sale of trade editions, or on the sale of library editions of children's books to schools and libraries;

(d) adoption of a policy for the pricing, sale and marketing of library editions of children's books to schools and libraries to comply with the terms of the consent decrees in the civil actions brought by the federal government;

(e) meetings between any defendants, or between any defendant and another publisher or wholesaler which concerned the pricing, sale or marketing policy followed with respect to trade editions or library editions of children's books; and

(f) the added cost per book of producing a library edition as opposed to a trade edition.

5. All correspondence between a defendant and any other defendant, any publisher, and any wholesaler during the years 1966 through 1969, inclusive, which refers or relates to the matters enumerated in paragraph 4 above.

6. Documents showing the total sales of trade editions and library editions of children's books for the years 1966, 1967, 1968 and 1969.

(Names of counsel omitted)

Dated: July 28, 1969.

In The United States District Court

(Caption—No. 67 C 1899, etc.)

ORDER

Upon a showing of good cause, the plaintiffs' Rule 34 motion dated July 28, 1969, is granted and defendants shall produce for inspection and copying the documents enumerated therein on or before August 21, 1969, except that the documents enumerated in paragraphs 2 through 6 in said motion shall be produced on or before September 15, 1969; provided that if any defendant objects to the production of any document described in paragraph 1 of plaintiffs' motion on the grounds of "attorney-client" or "work-product" privilege, such defendant on or before August 21, 1969, shall file said document in a sealed envelope, accompanied by a precise factual statement setting forth the circumstances under which the document was prepared. The defendants shall on or before August 28, 1969, file briefs in support of the privilege claimed with respect to the document submitted under seal. Plaintiffs shall have until September 5, 1969, to file answering briefs on these issues. The factual statement to be filed by August 21, 1969, and all briefs shall be served upon all parties on the service list.

Enter:

/s/ Bernard M. Decker
United States District Judge

Dated: August 7, 1969.

MEMORANDUM OPINION
of October 7, 1969

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

STATE OF ILLINOIS, Plaintiff, -vs- HARPER & ROW PUBLISHERS, INC., et al., Defendants. AND RELATED CASES.	No. 67 C 1899

MEMORANDUM OPINION

Pursuant to 28 U.S.C. § 1407, more than forty separate antitrust actions have been transferred to this court for consolidated discovery and pretrial proceedings. Originally instituted in eight judicial districts, the private treble damage suits seek compensation from publishers and wholesalers for alleged conspiracies which inflated the prices for children's editions of library books. The plaintiffs are state and local governments, public schools, and public libraries.

In an ambitious discovery program, the parties have deposed approximately one hundred witnesses during the last four months. Since many of the central events occurred six to ten years ago, the deponents' memories are often incomplete. Some witnesses have been deliberately evasive. Other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence. Deposition testimony sometimes conflicts with documentary evidence

which the witnesses personally prepared several years ago. The plaintiffs therefore seek to inspect the grand jury transcripts of eleven witnesses who testified about three years ago.[1] In addition, the public schools and libraries ask that the publisher and wholesaler defendants produce all debriefing memoranda that summarize the deponents' grand jury testimony.

After discussing whether the grand jury transcripts should be released, this opinion will outline the procedure which will govern the disposition of additional requests for the disclosure of transcripts. Then, the defendants' two objections to revealing their debriefing documents, the attorney-client privilege and the work product doctrine, will be analyzed.

I. GRAND JURY TRANSCRIPTS.

Rule 6(e) of the Federal Rules of Criminal Procedure declares that:

> "[Persons] may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding . . . No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The disclosure of grand jury minutes is committed to the sound discretion of the trial judge. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959). In cases of particularized need, the long established policy of grand jury secrecy is lifted discretely and limitedly. To illustrate, in *United States* v. *Procter & Gamble*, 356 U.S. 677, 683 (1958), the Supreme Court explained that "the use of the grand jury transcript at the trial to impeach

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[1] In 1966 the federal government convened a criminal grand jury to investigate the pricing of library editions of children's books. Although nearly ninety witnesses testified, the United States decided not to seek indictments.

a witness, to refresh his recollection, to test his credibility and the like" constitute particularized need.[2] See *Dennis* v. *United States*, 384 U.S. 855, 873-874 (1966).

A. *In Camera Inspection*

Plaintiffs want to examine the transcripts of John Callway, Joseph Christie, Francis H. Dyckman, Jr., S. Gordon Ferguson, Alan C. Hood, Thomas Maher, Paul D. Rust, Frank Scioscia and James L. Thompson.[3] The publishers and wholesalers maintain that the transcripts are sought purely for discovery purposes. But the vast majority of the witnesses are beyond the subpoena power of the forum court. The depositions are therefore evidentiary. The use of grand jury minutes to refresh the deponents' recollection or to impeach their statements is equivalent to their use at trial.

During the depositions, each witness demonstrated a remarkable lack of memory concerning critical events in controversy. This court's *in camera* inspection of the witnesses' grand jury transcripts reveals that each witness' recall was substantially more extensive in 1966. In each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect. *Compare Atlantic City Electric Co.* v. *A.B. Chance Co.*, 313 F.2d 431, 434 (2nd Cir. 1963); *Con-*

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[2] *Compare United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940):

> "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

[3] Two additional grand jury witnesses, James F. Heidelberger and William J. Hoocker, are either deceased or too sick to be deposed. Other than a declaration of relevancy, plaintiffs have advanced no showing of particularized need. Moreover, the testimony recorded in the transcripts of Heidelberger and Hoocker would be inadmissible at trial. Accordingly, these transcripts will not be released.

solidated Edison Co. of N.Y. v. *Allis-Chalmers Mfg. Co.*, 217 F.Supp. 36, 38 (S.D. N.Y. 1963). Furthermore, as Judge Boldt stated in *In re Sellers*, 32 F.R.D. 473, 477 (N.D. Ill. 1962):

> "[T]he likelihood that the witness' recollection will become even dimmer by the time of trial is itself an important reason for allowing disclosure at this stage of the proceedings."

In the interest of justice, there is a compelling need for the disclosure of the requested minutes.

The most relevant parts of the transcripts are interwoven with the remainder of the witnesses' testimony, so that various portions should not be segregated from one another. The entire transcripts will be released since they contain no extraneous matter. Neither the votes nor the deliberations of the grand jurors appear in the minutes.

The following protective order will guard the integrity of all released minutes:

> "The transcript is provided solely for the personal perusal of counsel and shall be used only for such further interrogation of deponents as may be authorized. No part of the transcript shall be copied or reproduced, and the entire transcript shall be returned to this court when its use has been completed."

See *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce*, 323 F. 2d 233, 237 (5th Cir. 1963).

B. Additional Transcripts.

Since the public schools and libraries will undoubtedly seek to inspect additional grand jury minutes, the procedure governing their release may appropriately be discussed at this time.[4]

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[4] The conclusions reached in this section also provide an alternative ground for releasing the nine transcripts considered in part *I.A. supra*.

Five policy reasons have traditionally been advanced for imposing secrecy upon grand juries.[5] The only relevant justification for secrecy here is encouraging free future disclosure by individuals with information about antitrust violations. See *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 490 (E.D. Pa. 1962). In particular, since potential witnesses are normally employees, customers or suppliers of the offenders, the witnesses might suffer retaliation if their testimony became public. On the other hand, *Dennis* v. *United States*, 384 U.S. 855 (1966), significantly eroded the principle of grand jury secrecy when its main justification is encouraging the subsequent disclosure of crimes. In criminal prosecutions, the witnesses' grand jury minutes must be furnished directly to the defendant once particularized need is established, thus publicizing the earlier testimony.

Moreover, the Supreme Court indicated that a showing of particularized need varies depending upon the impor-

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[5] See *United States* v. *Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

See also *United States* v. *Procter & Gamble*, 356 U.S. 677, 681 n.6 (1958).

tance of maintaining secrecy in each individual situation.[6] When a treble damage suit is tried, grand jury witnesses are usually called to testify. Their earlier disclosure may then become public knowledge, thus exposing them to potential retaliation. Release of the grand jury minutes during discovery merely advances the same dangers created at trial.[7] In his dissent to *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 406 (1959), Mr. Justice Brennan explicated that:

> "Disclosure of his testimony before the grand jury is hardly likely to result in any embarrassment that his trial testimony has not already produced. 'If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm . . . which his testimony on the open trial does not equally tend to produce.' 8 Wigmore, Evidence (3d ed. 1940), § 2362, at 725."

Furthermore, relatively little secrecy surrounds the 1966 children's books grand jury. The defendants' attorneys con-

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[6] "Certainly in the context of the present case, where the Government concedes that the importance of preserving the secrecy of the grand jury minutes is minimal and also admits the persuasiveness of the arguments advanced in favor of disclosure, it cannot fairly be said that the defense has failed to make out a 'particularized need.'" 384 U.S. 871-872.

[7] After reviewing the judiciary's increasing willingness to release grand jury minutes, Mr. Justice Fortas recently declared that:

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." 384 U.S. at 870.

Dennis v. *United States*, 384 U.S. 855, 870 (1966). While the Supreme Court has not yet authorized automatic disclosure in treble damage actions, the scope of discovery is normally wider in civil litigation than in criminal prosecutions.

tacted numerous witnesses immediately after their appearance and recorded the substance of the witnesses' testimony in debriefing memoranda.[8] After preparing their own testimony summaries, other witnesses circulated their debriefing statements to their corporate superiors. The publishers' and wholesalers' reliance upon the principle of grand jury secrecy is designed to conceal from the public schools and libraries relevant information which the defendants have already assembled.

During the nine depositions discussed in part *I.A. supra*, the witnesses were repeatedly unable to recall significant facts. What recollection they could muster was often so vague as to be of only limited value. Their testimony sometimes conflicted with documentary evidence, including correspondence to and from the witnesses themselves. Since the importance of preserving the instant grand jury minutes is minimal, *in camera* analyses will not be conducted in the future if the public schools and libraries demonstrate similar recalcitrance and unexplained failures to remember.[9] Such a showing will constitute particularized

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[8] One law firm interviewed at least ten witnesses, including several employees of unrelated companies.

[9] In a related context, Chief Judge Pence explained that:

> "It is now well settled that disclosure rather than suppression of relevant materials in grand jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting disclosure of relevant testimony therein."

State of Washington v. American Pipe & Const. Co., 41 F.R.D. 59, 63-64 (S.D. Cal. 1966).

need justifying the release of the witnesses' grand jury transcripts.[10]

II. DEBRIEFING MEMORANDA.

Plaintiffs' examination of additional grand jury minutes will require that a witness first be deposed. As a more complete aid to discovery, the public schools and libraries therefore seek to inspect the debriefing memoranda which were prepared soon after the witnesses testified before the grand jury. The debriefing statements are essentially factual summaries of the witnesses' testimony.[11] The documents may substantially refresh future deposition recollection, thereby rendering extensive transcript requests unnecessary. Furthermore, the debriefing statements may discuss relevant aspects of the alleged price fixing conspiracy which

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[10] Having invaded the grand jury secrecy by their debriefing of the witnesses, the defendants have advanced no compelling policy justification for withholding the transcripts from the plaintiffs. Therefore, the public schools and libraries may be entitled to examine the minutes prior to deposing the witnesses. Rather than releasing the minutes in a wholesale fashion, the court might disclose only the transcripts of those witnesses whom the plaintiffs actually expect to question. But, the broad holding of *United States* v. *Procter & Gamble*, 356 U.S. 677, 683 (1958), suggests that such a decision could be appropriate for certification under 28 U.S.C. § 1292(b), thus completely halting discovery for many months. At this stage of the litigation, an early release of the minutes does not warrant the substantial delay which might ensue.

[11] The memoranda were filed with this court in sealed envelopes, accompanied by a precise factual statement specifying how the documents were prepared.

In their briefs, several defendants object strenuously to any unsealing of the envelopes, including *in camera* inspection. The envelopes therefore remain unopened. But as a consequence, ambiguities and omissions in defendants' factual statements have necessarily been construed against them.

were not probed by the grand jury, thus supplementing the minutes which will be released today.[12]

When the debriefing documents were prepared, counsel often assisted witnesses in their recollection.[13] Defendants therefore resist production under F.R.C.P. 34, maintaining that the documents are insulated by the attorney-client privilege and by the work product doctrine.

A. *Attorney-Client Privilege.*

Communications from a client to a lawyer may be immune from discovery. See, *e.g., Radiant Burners, Inc.* v. *American Gas Ass'n.*, 320 F.2d 314, 324 (7th Cir. 1963).[14] Either of two varieties of the attorney-client privilege can exist. First, when the debriefing statements were prepared, counsel and the witnesses may have had a personal attorney-client relationship. While numerous defendants claim such immunity, they failed to present any factual support for their assertions. With one exception,[15] the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony, (2)

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[12] For example, in order to clarify the scope of the grand jury's inquiry, a witness may have specified that there were no questions concerning various enumerated incidents of dubious legality. Such a debriefing statement could be valuable to refresh a witness' recollection or to impeach deposition statements.

[13] The memorandum may have been designed to circumvent the secrecy surrounding grand juries. By aggregating the statements from most subpoenaed witnesses, antitrust defendants might determine what evidence was presented to the grand jury.

[14] The Seventh Circuit held that the attorney-client privilege protects "confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby."

[15] Prior to Bonsal's grand jury appearance, his lawyers prepared wills for the family, thus establishing a personal attorney-client relationship. Bonsal's debriefing memorandum will be returned unopened.

advise them on other personal matters, or (3) bill the witnesses for their services. Since the lawyers' respective law firms were counsel for the witnesses' employers, the debriefing consultations were apparently conducted as a favor to the corporations. The documents are thus not protected by a personal attorney-client privilege.

Second, a corporate attorney-client privilege could have existed. See, *e.g.*, *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 359-360 (D. Mass. 1950); *Radio Corp. of America* v. *Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955). But only communications from certain employees to the company's attorney create that relationship. Specifically, a responsible member of the corporation's management or control group must seek legal advice about corporate affairs. See, *e.g.*, *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).[16] Moreover, the corporate official must be in a position to influence the decision about which legal counsel is sought. In *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968), the Tenth Circuit stated that:

> "[T]he test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power."

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[16] "[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."

See also *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Cal. 1963).[17]

In the instant cases, the debriefing memoranda were created to assist the publishers and wholesalers in defending the actions instituted by the federal government and private treble damage plaintiffs. Only Bonsal and Milne were in a position to influence their company's litigation strategy in these lawsuits.[18] While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases. Accordingly, the debriefing documents are not protected by a corporate attorney-client privilege.

B. *Work Product Doctrine.*

The work product doctrine protects counsel's legal strategies and thought processes from discovery by an adversary. *Hickman* v. *Taylor*, 329 U.S. 495, 509 (1947). The principle does not, however, insulate non-legal services rendered by persons who happen to be attorneys.

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[17] Defendants rely heavily upon *Continental Oil Company* v. *United States*, 330 F.2d 347, 349 (9th Cir. 1964). In an abbreviated opinion, the Ninth Circuit concluded that personal and corporate attorney-client relationships existed. The Court did not analyze which corporate officials' consultations create the privilege.

[18] These individuals' memoranda will be returned in the sealed envelopes.

Mr. Milne "participated in—and in some instances controlled—the decisions which William Morrow and Company made in connection with the corporate conduct which forms the basis of these actions."

The statements may be divided into two categories.[19] In the first group, the lawyers functioned primarily as investigators. By asking questions and recording the answers, they attempted to reconstruct the witnesses' grand jury testimony. Such peripheral participation by a lawyer does not convert a factual summary into his work product. In *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D. N.Y. 1951), Judge Weinfield expounded that:

> "The rationale underlying . . .[*Hickman* v. *Taylor*] was intended to apply only when [an attorney] acts in his true professional capacity.
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> "It is a fair inference that the procurement of the statements . . . was not the result of any basic professional relationship between the lawyer . . . and the defendant, or that it required the training, skill and knowledge of a lawyer or the essential integrity implicit in the lawyer-client relationship. The services were those normally rendered by an investigator or claim agent . . ."

See *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264, 267 (D. Colo. 1963).

Second, certain statements, such as those of Hoocker and Rowe, contain counsel's "recollections, observations, comments and impressions about [the witness'] report of his appearance before the grand jury." Assuming *arguendo* that these nebulous additions constitute work product, these documents are only entitled to limited pro-

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[19] According to Golden Press, Inc., its document B-1 "is not a debriefing memoranda. . .

> "The document consists primarily of statements by counsel. Only a very small portion of the memoranda concerns statements made by the witness during the course of his examination by the grand jury."

The statement will therefore be returned to the defendant.

tection since they remain basically summaries of testimony.[20]

Under F.R.C.P. 34, work product materials may properly be examined by the opposing party if there exists good cause or special circumstances which justify invading the attorney's thought processes. See, *e.g., Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 207 F.Supp. 407, 410-411 (M.D. Pa. 1962).[21] In determining whether good cause has been established, the harm caused by revealing lawyers' work product is compared with the need for discov-

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[20] Counsel have not indicated that their professional abilities were utilized; presumably, the documents do not include legal analysis nor do they discuss litigation strategy.

If the mere physical involvement of an attorney converted documents into work product, parties could easily insulate damaging evidence from an adversary. Alternative discovery procedures, such as depositions and the production of related materials, might be less revealing than the documents clothed with immunity.

[21] Contrast *Allmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), and *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954), in which the moving parties failed to make the requisite showing of good cause. Nevertheless, the Seventh Circuit explained that:

> "The presence of special circumstances might, of course, constitute good cause for the entry of an order to produce such statements for examination." 216 F.2d 507.

Judge Robson denied discovery of work product statements in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F.Supp. 736, 741 (N.D. Ill. 1962), because:

> "Plaintiffs in their brief admit that no showing of good cause along traditional lines has been presented. They argue that the unique character of this litigation is of itself a sufficient showing of good cause for production."

ery. In *United States* v. *Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959), Judge Hoffman thus declared that:

> "The privilege of the lawyer's work product and the showing of good cause sufficient to overcome it are interdependent, and when, as here, the factors supporting the claim of privilege are weak, the requisite showing of good cause is correspondingly lessened."

The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from "net" prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances.

When compared to the defendants' minimal work product claims, the plaintiffs' need for discovery establishes good cause under F.R.C.P. 34. Plaintiffs have demonstrated special circumstances which justify the disclosure of counsel's comments and notations that were interspersed among the factual summaries of grand jury testimony. See, *e.g.*, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 47 (S.D. N.Y. 1951); *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Del. 1954); *Sharon Steel Corp.* v. *Travelers Indemnity Co.*, 26 F.R.D. 113, 115 (N.D. Ohio 1960). Accordingly, except for the Bonsal and Milne documents, all debriefing memo-

randa may be examined by the plaintiffs. The statements will not be returned to the defendants at this time.

III. CONCLUSION.

Nine of the requested grand jury transcripts will be released since the plaintiffs have demonstrated particularized need. The importance of maintaining secrecy is minimal in these consolidated cases. In the future, grand jury minutes will be released without an *in camera* inspection if plaintiffs establish that the deponents have a glaring failure of memory or that their testimony contradicts reliable documentary evidence.

With respect to the debriefing documents, only the Bonsal memorandum is privileged because of a personal attorney-client relationship. Similarly, the corporate attorney-client privilege protects only the Bonsal and Milne documents. The other witnesses were not members of the corporation's control group. Finally, none of the documents is immunized by the work product doctrine since counsel's peripheral participation is outweighed by the compelling need for discovery in these actions.

Enter:

/s/ Bernard M. Decker
United States District Judge.

Dated: October 7, 1969.

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

ORDER

Upon a showing of good cause as set forth and discussed in this Court's Memorandum Opinion of October 7, 1969,

It Is Hereby Ordered that all debriefing statements previously filed with this Court in sealed envelopes, pursuant to the order entered on August 7, 1969, shall be released by the Clerk of this Court directly to liaison counsel for plaintiffs for inspection and copying, with the exception of the debriefing statements taken from grand jury witnesses George Bonsal, James Milne and Golden Press witness "B-1" which shall be returned to the respective defense counsel involved.

Enter:

/s/ Bernard M. Decker
Bernard M. Decker
District Judge

Dated: October 17, 1969.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Harper & Row Publishers, Inc., et al., Petitioners, v. Honorable Bernard M. Decker, United States District Judge, Respondent.	No. 18008 Original Petition for Writ of Mandamus

PETITION FOR WRIT OF MANDAMUS

Now come the below listed petitioners and petition this Court:

a. To issue a rule upon respondent, Honorable Bernard M. Decker, Judge, United States District Court for the Northern District of Illinois, to show cause why a writ of mandamus should not issue in this case;

b. To issue a writ of mandamus compelling respondent to vacate his order dated October 17, 1969, which permits plaintiffs to inspect and copy approximately 30 memoranda, all but one of which were prepared by petitioners' attorneys after they conferred with various grand jury witnesses. Copies of that order and of respondent's October 7, 1969 opinion upon which the order was based are appended hereto as Exhibits A and B;

c. To issue a writ of mandamus compelling respondent to return to petitioners' attorneys all of the memoranda in question without permitting any person to inspect or copy those memoranda;

d. To issue an order staying respondent's order of October 17, 1969, pending disposition of this petition for a writ of mandamus; and

e. To issue an order granting petitioners leave to file a brief in support of this petition within 15 days thereafter, and establishing a schedule for the filing of an answering brief in opposition to this petition and a reply brief in support of it.

STATEMENT OF FACTS

1. Commencing in the spring of 1966, many employees, former employees and/or agents of petitioners appeared as witnesses before one or more federal grand juries which were investigating various aspects of the publishing industry. Some of these witnesses also were represented individually by the same attorneys who represented their corporate employers (petitioners here). The corporate

employers were potential targets of the grand jury investigation, and both the employers and the individual witnesses were potential defendants in antitrust treble damage actions. Indeed, one such treble damage action had been commenced against certain petitioners even before the memoranda in question were prepared.

2. Petitioners' attorneys conferred with these witnesses prior to and following their respective grand jury appearances. Thereafter those attorneys, in the course of representing their corporate and individual clients generally and/or in connection with pending and impending judicial proceedings, prepared memoranda which contained their thought processes and impressions as well as statements of the witnesses—which statements all those concerned believed were being divulged to the attorneys in confidence. All of the memoranda in question were prepared by the attorneys except one, which was prepared for the attorney by the witness himself, under the direction and with the active assistance of the attorney.

3. Most of the memoranda in question were retained by the attorneys in their files and were never given to the witnesses or to their corporate employers. In a few instances, however, a copy of a particular memorandum was given to an officer of the corporate employer of the witness in question.

4. No indictment was returned as a result of the grand jury investigations. On April 18, 1967, the Justice Department instituted 18 separate civil actions for injunctive relief. The complaint in each of those 18 actions named only a single defendant (a publisher of children's books), and no wholesalers were named as defendants in any of those actions. The gist of each complaint was resale price maintenance, involving the relationship between the single named publisher-defendant and the wholesalers

which distributed library editions of that publisher's children's books.

5. On October 23, 1967, consent decrees were filed in each of the 18 government actions; the decree in each action was agreed to by the Justice Department and by the single defendant named therein. Each of those consent decrees expressly stated that it did not constitute an "admission by either party in respect to any issue". On November 27, 1967, Judge Marovitz approved and entered the 18 consent judgments.

6. Thereafter, numerous multi-party antitrust treble damage actions relating to library editions of children's books were filed in various district courts throughout the United States. Those actions were consolidated for pretrial purposes in the United States District Court for the Northern District of Illinois. Petitioners are some of the publisher and wholesaler-defendants in these treble damage actions; many of petitioners, however, were not defendants in the above-described government actions.

7. On July 28, 1969, plaintiffs in these treble damage actions filed a Rule 34 motion, paragraph 1 of which sought production of "all memoranda, reports, summaries, notes, and correspondence which refer or relate to the testimony of any employee or former employee of the defendants in connection with the grand jury investigation", including memoranda prepared by attorneys. On August 7, 1969 respondent ordered petitioners to submit under seal all memoranda as to which they claimed the protection of either the attorney-client privilege or the work-product doctrine. At the same time, respondent ordered petitioners to file, with respect to each such memorandum, "a precise factual statement setting forth the circumstances under which the document was prepared", and he also ordered the parties to file briefs dis-

cussing the applicable legal principles. A copy of respondent's August 7 order is appended hereto as Exhibit C.

8. On or about August 21, 1969, petitioners' attorneys submitted the memoranda in question under seal, and simultaneously filed the descriptive statements which respondent had requested. Thereafter, on or about August 28, 1969, petitioners filed briefs discussing the significant legal questions which were presented by plaintiffs' motion for production of those memoranda, and the reasons why the attorney-client privilege and the work-product doctrine were applicable to preserve the confidentiality of the memoranda.

9. In early September, plaintiffs filed a brief contending that neither the attorney-client privilege nor the work-product doctrine protected the confidentiality of the memoranda in question, and petitioners thereafter filed reply briefs discussing those issues. On September 25, 1969, respondent entertained oral argument as to the propriety of disclosing the memoranda to the plaintiffs. A copy of the transcript of that proceeding is appended hereto as Exhibit D.

10. In an opinion dated October 7, 1969, respondent held that all but three of the memoranda submitted under seal were to be turned over to plaintiffs. In the same opinion, respondent held that plaintiffs could inspect the entire transcript of the grand jury testimony of nine of the eleven individuals whose grand jury testimony plaintiffs had sought to examine; nevertheless, memoranda relating to the grand jury testimony of those nine individuals are among the memoranda in question here. Respondent's October 7 opinion also stated that in the future additional grand jury transcripts would be released to plaintiffs, upon a showing that particular witnesses had

demonstrated "recalcitrancy and unexplained failures to remember" at their depositions (Respondent's opinion, p. 10).

11. On October 17, 1969 respondent entered an order authorizing plaintiffs to inspect and copy the attorneys' memoranda in question (Exhibit B hereto). Petitioners moved for the inclusion in that order of a statement of certification pursuant to 28 U.S.C. § 1292(b), but respondent denied that motion. In doing so, respondent made an additional statement of his views; a transcript of that statement is attached hereto as Exhibit E. Immediately thereafter, petitioners moved for an order staying the disclosure of the memoranda for five days, and respondent granted that motion.

ISSUES PRESENTED

Whether mandamus should issue because respondent exceeded his power and authority, and abused his discretion, by making the following holdings:

1. That the attorney-client privilege, which was held to be applicable to communications between corporate clients and their attorneys in *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir. 1963), cert. den. 375 U.S. 929 (1963), applies to preserve the confidentiality of communications between a corporate employee and counsel for the corporation *only* if the corporate employee is (1) "a responsible member of the corporation's management or control group", who is (2) seeking "legal advice about corporate affairs", *and* who also is (3) "in a position to influence the decision about which legal counsel is sought" (Respondent's opinion, p. 14).

2. That, at the time of the interviews to which the memoranda in question relate, no attorney-client relation-

ship existed between the attorneys and the individuals being interviewed (even though the attorneys and the individuals believed that such a relationship did exist), *merely* because "the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony, (2) advise them on other personal matters [unrelated to their grand jury testimony], or (3) bill the witnesses for their [legal] services" (Respondent's opinion, p. 13).

3. That many of the memoranda in question were not prepared by attorneys acting in their professional capacities and utilizing their professional expertise, and hence did not constitute attorneys' work product (Respondent's opinion, pp. 16-17).

4. That "special circumstances" exist here which make disclosure of the memoranda to plaintiffs "essential to the preparation of [plaintiffs'] case and in the interest of justice" *Alltmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), cert. den. 339 U.S. 967 (1950); *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954) (Respondent's opinion, pp. 18-20).

STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

1. Petitioners will be prejudiced irreparably if they are not afforded immediate review through mandamus of respondent's extraordinary curtailment of the attorney-client privilege. Respondent's decision raises questions of law which are of vital concern not only to petitioners but also to the Bar in general. With respect to the attorney-client privilege, while the lower court cases are not in complete accord, none has gone so far as respondent has gone in narrowing the scope of the privilege and limiting its effectiveness. With respect to work product,

respondent's decision is in conflict even with *Hickman* v. *Taylor*, 329 U.S. 495 (1947), as well as with the decisions of appellate courts which have applied the principles enunciated in *Hickman* v. *Taylor*.

Respondent's decision involves much more than a mere exercise of judicial discretion. In particular, the attorney-client privilege is available as a matter of law, not as a matter of judicial discretion. Thus respondent had no authority or power to deprive petitioners (or the individuals whose communications are involved) of the protection of that privilege for the erroneous reasons given in his opinion. Since respondent has ordered that the memoranda in question be disclosed to plaintiffs immediately, no other method of obtaining effective review of respondent's decision is available, and the confidentiality of the memoranda will be lost irretrievably unless review by mandamus is authorized.

2. Respondent's order has the effect of depriving *corporate* clients of the protection of the attorney-client privilege in the vast majority of situations where that privilege is important to them. An attorney cannot advise and represent a client adequately unless the client can tell the attorney frankly and in confidence all of the facts which are relevant to the issue regarding which advice is sought. The attorney-client privilege, of course, is designed to permit and indeed to encourage such disclosures, which would not be made so freely if an adverse party could then obtain detailed information about them by discovery addressed *to the attorney*.

The relevant facts often, and perhaps usually, are not known first hand to the executives who control a corporation's litigation strategy—the only corporate personnel with whom respondent would permit a corporation's attorneys *to* communicate confidentially. If the control

group theory is adopted and applied as it has been here, a corporation's attorney could not conduct confidential interviews in the vast majority of situations in which an *employee*—such as a driver, mechanic, salesman or sales manager, or even a vice president not in a "control capacity"—acted on behalf of the corporation, and has knowledge of relevant facts. The facts as to which legal advice was sought could be obtained in confidence only through a controlling officer who might have no familiarity with, or first-hand knowledge of, those facts. Moreover, a corporation's attorney would in many instances be precluded from providing legal advice on a confidential basis to those corporate employees whose duties and responsibilities most require that they receive such advice—*e.g.*, sales personnel, to whom advice regarding compliance with the Robinson-Patman Act would be particularly important. The rule adopted by respondent would effectively deprive corporate clients of the right to soundly based legal advice which the attorney-client privilege is designed to protect, and would deprive the public of the benefits which result when soundly based legal advice deters clients from committing violations of the law.

Whether the attorney-client privilege should be so drastically restricted clearly presents an issue which warrants review by this Court. This is particularly true in view of the fact that in *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314, 323-324 (7th Cir. 1963), cert. den. 375 U.S. 929 (1963), although this Court declined to decide the scope of the attorney-client privilege as it relates to corporate clients, it did at the same time state (1) that "Where a corporation is the client it must act through its officers and agents", (2) that "problems concerning confidentiality will necessarily vary" according

to the size of the corporate client involved, and (3) that those problems were "competently met" by Judge Leahy in *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Del. 1954), and by Judge Wyzanski in *United States* v. *United Shoe Machinery Corporation*, 89 F.Supp. 357, 359 (D. Mass. 1950). Both of those decisions are inconsistent with the "control group" test adopted by respondent; those decisions hold that the attorney-client privilege applies to preserve the confidentiality of communications between a corporation's attorney and employees of the corporation who are *not* within a "control group", so long as the communications are made in confidence for the purpose of, or in connection with, the seeking and furnishing of legal advice to the corporation (as is true of all of the communications at issue here).

3. Respondent's order also imposes novel and severe limitations upon the right of *individuals* to utilize the absolute protection which traditionally has been afforded by the attorney-client privilege. Respondent's decision in effect holds that the privilege does not preserve the confidentiality of a communication between an individual and his attorney, if that attorney also happens to represent the individual's employer, unless the attorney had subsequently or on other occasions represented the individual, or had charged him a fee for the services in question. These stringent and completely unprecedented tests have no basis in reason or in policy. Customarily when an individual and his employer are both involved on the same side of a legal controversy involving the employee's actions on behalf of his employer, the employer's attorneys act on behalf of both, and the employer pays the attorneys' fees. Respondent's test, however, would make utilization of the attorney-client privilege exceptionally difficult in such circumstances.

The public interest in the maintenance of the attorney-client privilege—one of the most important reasons for the existence of that privilege—is not even mentioned in respondent's opinion. Not only does that opinion limit the ability of counsel to obtain the relevant facts and information without which the giving of sound legal advice (which long has been a matter of public concern) is impossible; of equal, if not greater, importance is the fact that respondent's opinion significantly limits the effectiveness of the legal advice which can be given.

Under respondent's opinion, the attorney-client privilege is available only when a corporation's attorney advises the corporation's president, or a limited number of executives belonging to the corporation's control group; according to respondent, that privilege is not available to preserve the confidentiality of communications wherein a corporation's attorney gives legal advice to the hundreds or thousands of other corporate employees or agents who presumably are less well informed, and more in need of such advice, than the members of the corporation's "control group". Thus if respondent's opinion is permitted to stand, those employees least able to afford it would be required to employ personal counsel, at their own expense, in order to have the benefit of the attorney-client privilege, and thereby to obtain competent and confidential legal advice about how to conduct themselves in the activities which they engage in on behalf of their corporate employers. If an employee is foreclosed from communicating freely with his corporation's attorney regarding matters relating to his corporation's business, he well might perform acts which soundly based legal advice would have prevented, thereby subjecting both himself and his corporate employer to liability. In this respect, respondent's opinion will have serious adverse

consequences, by depriving the public of the beneficial deterrent effects which result when attorneys are permitted confidentially to obtain all relevant facts, and to give legal advice based thereon. This is particularly inappropriate in view of the increasing emphasis which the Bench, the Bar and our society generally have placed upon the importance of making sound legal advice readily available to all citizens, regardless of their ability to pay attorneys' fees.

4. Respondent's order also impairs the protection which traditionally has been afforded to preserve the confidentiality of attorneys' work product. The work-product doctrine manifestly is applicable to preserve the confidentiality of a memorandum which an attorney has prepared (or helped to prepare) in the course of representing his clients generally, and/or in connection with specific pending and impending legal proceedings. This is particularly true where, as here, those memoranda are professional products which reflect the attorney's questions and analyses, as well as his utilization of professional expertise to elicit, analyze and evaluate information which he considered relevant and material.

Respondent has stated that some of the attorneys' memoranda in question are not work product because each is a mere "factual summary" of a witness' statements to an attorney (Respondent's opinion, p. 16). But there is no support in the record for respondent's assumption regarding the contents of the memoranda; indeed, respondent has admitted that he did *not* examine any of the memoranda (Respondent's opinion, p. 11). Even if respondent's assumption were correct, however, an attorney's summary of a witness' statements to the attorney (other than a shorthand transcript) inevitably will reflect the attorney's reactions to, and evaluation of, those state-

ments. In this respect respondent's holding that many of the attorneys' memoranda are not work product is inconsistent with *Hickman* v. *Taylor*, 329 U.S. 495 (1947), where the Supreme Court held to be work product "all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for defendants" (329 U.S. at 499); attorney Fortenbaugh had "privately interviewed the survivors [of an accident] and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements . . ." (p. 498). The Court held such statements to be work product, without undertaking any inquiry as to how much of the reaction of the lawyer was reflected in his summary of what the witnesses had said, and without reference to the fact that the witnesses in question were outsiders *not* employed by the attorney's client. *A fortiori*, this Court should protect the confidentiality of the memoranda in question here, which are not merely "interview memoranda" and which relate to individuals who were not "outsiders".

5. Attorneys' work product should not be disclosed to an adverse party in the absence of "special circumstances" which make such disclosure "essential to the preparation of [the adversary's] case and in the interest of justice." *Alltmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), cert. den. 339 U.S. 967 (1950); to the same effect, see *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954). Respondent's opinion holds that even if the attorneys' memoranda in question are work product, "special circumstances" exist which justify disclosure of those memoranda to opposing counsel. Respondent's finding of "special circumstances", however, is based upon facts which are neither special nor unusual, and indeed which are present in virtually every antitrust treble damage action. Respondent has based

his finding of "special circumstances" primarily upon his statements (1) that "because the alleged price fixing conspiracy was particularly active six to ten years ago, * * * the intervening years continue to obscure many crucial factual questions", and (2) that "if the conspiracy existed, plaintiffs' inability to prepare fully for trial results from * * * [defendants'] concealment of the price fixing" (Respondent's opinion, pp. 19-20). In those respects, however, the instant litigation does not differ from any other antitrust treble damage action in which the plaintiff has alleged conspiratorial price fixing and the concealment thereof, and no authority has even suggested heretofore that such factors constitute "special circumstances" which warrant disclosure of attorneys' confidential work product. Indeed, in the electrical equipment antitrust cases attorneys' memoranda, quite similar to those in issue here, were held to be protected by the work-product doctrine. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F.Supp. 736, 741 (N.D. Ill. 1962); *City of Philadelphia* v. *Westinghouse Electric Corp.*, 32 F.R.D. 350 (E.D. Pa. 1962).

Equally inappropriate is respondent's suggestion that the requisite "special circumstances" exist merely because *some few* deponents have been unable to recall relevant incidents, "do not remember receiving incriminating correspondence", and/or "have little or no recall" when "confronted with copies of their own letters" (Respondent's opinion, p. 19). Although nearly 100 individuals have already been deposed in this litigation; plaintiffs below have complained about the allegedly poor memory of only nine of those deponents, and respondent already has permitted plaintiffs to inspect the entire transcript of the grand jury testimony of each of those nine individuals. In addition, respondent's October 7 opinion ex-

pressly states that plaintiffs will be permitted to examine the transcript of the grand jury testimony of other individuals who at their depositions "demonstrate similar recalcitrance and unexplained failures to remember" (Respondent's opinion, p. 10):

Clearly, then, respondent is both willing and able to provide plaintiffs with the grand jury testimony of individuals whose memories are poor. What basis is there for also disclosing to plaintiffs the attorneys' memoranda which relate to that same testimony—memoranda which contain the attorneys' comments and the results of their thought processes? Even more illogical, however, is respondent's suggestion that merely because nine individuals may have demonstrated "recalcitrance and unexplained failures to remember", there necessarily exist "special circumstances" which warrant the disclosure of attorneys' memoranda relating to more than 20 other individuals who have never even been accused of such conduct and whose depositions may (and in some cases because of death or incompetency will) never be taken.

6. In his oral statement of his views on October 17, respondent suggested that his October 7 opinion is merely an *ad hoc* decision addressed to the facts of this case, and will not have the sweeping effect on the Bar and on the public which petitioners asserted in support of their motion for certification pursuant to 28 U.S.C. § 1292(b). That this may have been respondent's intention is not, however, decisive. Respondent's opinion enunciates and approves several clearly articulated rules relating to the extent of the attorney-client privilege for corporate clients and for individual clients who are employees of corporate clients, and it is difficult to conceive of situations in which those rules might be given more sweeping effect than respondent has given them. Thus whatever respondent's

intention may have been, his opinion will (unless overturned) stand as a barrier to free communication (1) between attorneys for corporations and all corporate officials and employees who are not members of the corporate "control group", and (2) between attorneys for corporations and corporate employees who, having a joint interest with their corporations, wish to be represented by the corporation's attorney without having to pay that attorney's fee personally.

Petitioners respectfully urge that they be given the opportunity to submit a brief containing a more detailed statement of the foregoing reasons why the writ of mandamus should issue, together with an analysis of relevant cases and applicable legal principles.

(Names of counsel omitted)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Caption—No. 18008)

ANSWER TO PETITION FOR WRIT OF MANDAMUS FILED ON OCTOBER 20, 1969

(Filed Nov 7 1969)

This answer is filed on behalf of the Honorable Bernard M. Decker, United States District Judge, respondent, and on behalf of all plaintiffs in the treble damage antitrust suits now pending in the District Court for the Northern District of Illinois entitled *State of Illinois, et al.* v. *Harper & Row Publishers, Inc., et al.*, No. 67 C 1899 and related cases.[1]

[1] For a full description of the proceedings, plaintiffs refer the Court to the brief in opposition to a previous mandamus petition filed by the defendants and docketed as No. 17320 (1969).

The petitioners — defendants below — seek to compel Judge Bernard M. Decker to vacate a discovery order with respect to production of thirty (30) so-called "debriefing" statements taken from twenty-eight (28) witnesses after they had testified before a federal grand jury investigating price-fixing conspiracies in the sale of library editions of children's books to public schools and libraries. The defendants premise their request for a writ of mandamus upon the contentions that Judge Decker erroneously found (a) the evidence failed to establish that an attorney-client relationship existed, and (b) the plaintiffs had shown good cause and special circumstances for the production of the debriefing statements which outweighed the limited protection afforded by the work-product doctrine.

The defendants have advanced no factual or legal bases to invoke the extraordinary remedy of mandamus. With respect to both rulings attacked by the defendants, Judge Decker applied established legal criteria to the peculiar facts of this case. The sweeping assertions made in the mandamus petition are not supported by any of the evidence or factual material which defendants presented to the District Court, and which necessarily binds them in this proceeding. In many instances, deposition testimony of the witnesses from whom debriefing statements were taken flatly contradicts the conclusory repre-

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It should be noted that The American News Company, a defendant below, voluntarily produced three debriefing statements taken by its attorneys. In addition, Childrens Press, another defendant, submitted five debriefing statements to the District Court, but did not join the petition for writ of mandamus. Accordingly, these debriefing statements were released to plaintiffs pursuant to an order of this Court dated October 29, 1969.

sentation made by defendants. Respondents-plaintiffs, therefore, wish to supplement and correct the record.

STATEMENT OF FACTS

In a nation-wide discovery program pursuant to 28 U.S.C. § 1407, and involving multiple antitrust complaints, plaintiffs have deposed approximately one hundred (100) witnesses in the last several months. Faced with forgetfulness, recalcitrance, and evasiveness by a great number of witnesses, plaintiffs, on July 28, 1969, moved for the production of certain relevant and material documents, including all memoranda relating to the grand jury testimony of any employee or ex-employee of the defendants. On August 7, 1969, the District Court ordered that the defendants submit these documents to the Court, and that any defendant who objected to the inspection of any such document, on the ground of attorney-client privilege or work-product, file a "precise factual statement setting forth the circumstances under which the document was prepared." Thirty-eight (38) debriefing statements were thus submitted under seal with affidavits or statements describing the preparation of the documents and the claim of privilege.

The statements and affidavits submitted to Judge Decker by the defendants setting forth the circumstances under which the debriefing statements were recorded may be briefly summarized;[2]

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[2] Despite the fact that defendants focus their attack against Judge Decker's determination of factual issues, they have not presented their own statements and affidavits which formed a principal part of the evidence available to Judge Decker. We are including as Exhibit 1 the twenty-eight (28) affidavits and statements submitted by defendants pursuant to the District Court's order requiring a factual statement of the circumstances under which each document was prepared.

(a) Eleven of the witnesses interviewed had ceased being employees of the companies prior to the time they testified before the grand jury and submitted to interviews with the corporate attorneys. These are Kessel, Rowe (as to Putnam's), Street, Rose, Gannon, Goldman, Phraener, and Golden Press witnesses "B", "C", "D" and "E".

(b) Two other witnesses, Mathiesen and Rust, were not employed by the company whose attorney interrogated them.

(c) One witness, Callaway, wrote his own recollection of the grand jury testimony. The statements of two other witnesses, Thompson and Moormann, were prepared from dictaphone tape recordings, with the final drafts approved by the witnesses.

(d) Only with regard to fourteen witnesses was it even contended that the corporate lawyers were also acting as personal counsel.[1] In no instance is it claimed by a defendant that any of the grand jury witnesses formally or personally hired the attorney or paid him any fee. Only the Golden Press affidavits relating to witnesses "A" and "B" allege that the attorneys gave legal advice to the grand jury witnesses they interviewed, but even this occurred *before*, rather than after, the witness testified.

(e) Only two witnesses were officers of the corporation whose lawyers conducted the interviews; the others were employees. Of all the affidavits filed, only those relating to Messrs. Bonsall and Milne even suggest that the grand jury witness participated in corporate decision-

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[1] The witnesses involved are Bonsall, Callaway, Street, Hood, Thompson, Moormann, Stokes, Heidelberger, Davidson, Patella, Guerney, Scioscia, and Golden Press witnesses "A" and "B".

making with respect to this antitrust litigation, and their statements were excluded from the discovery order.

(f) A number of the witness interviews (or debriefing sessions) were attended by more than one attorney.

(g) Some of the debriefing statements were admittedly circulated to executives of the defendant involved.[5]

(h) Associates of one law firm conducted at least ten interviews of witnesses who were employees or ex-employees of five different companies.

Judge Decker reviewed the statements and affidavits submitted by the defendants and the deposition testimony of some of the witnesses involved. Thereupon, Judge Decker concluded that the debriefing statements, with one exception, were merely summaries of testimony gathered to ascertain what had occurred before the grand jury and to assist the publishers and wholesalers in defending against potential federal or private action.[6]

Judge Decker found that the defendants had failed to present factual support for their assertions of a personal attorney-client relationship stating:

> "With one exception [the witness Bonsall] the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony,

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[5] The witnesses involved are Callaway, Rowe and Kessel. Although the affiant lawyers in many instances assert that the debriefing statements were not shown to corporate executives, they do not state whether they related the substance of the witness interviews in reporting to the corporate executives. Nor do they assert that confidentiality was either requested or promised.

[6] Having objected to any *in camera* inspection of the debriefing statements filed under seal, defendants should not be heard to criticize Judge Decker for not reading the debriefing statements. See Memorandum Opinion of October 7, 1969, p. 11, ftn. 11; Petition for Writ of Mandamus, p. 16.

(2) advise them on other personal matters, or (3) bill the witnesses for their services. Since the lawyers' respective law firms were counsel for the witnesses' employers, the debriefing consultations were apparently conducted as a favor to the corporations."

Accordingly, Judge Decker ordered Bonsall's statement returned unopened, but held that the other debriefing statements were not shielded from discovery by the personal attorney-client privilege.

In their petition, defendants erroneously assert that "all those concerned believed [their statements] were being divulged to the attorneys in confidence" and that the individuals whose debriefing statements were taken believed that an attorney-client relationship existed at the time of their interview. (Petition, pp. 3, 8) Deposition testimony available from several witnesses flatly contradicts these blanket assertions. For instance, David Rose, an ex-employee of Harper & Row, testified:

"Q. After you testified before the Grand Jury, did you tell anyone about what you told the Grand Jury?

"A. Yes.

"Q. Who was that?

"A. Bill Ashworth of Harper's, *their lawyer.*

"Q. Were they there at the same time or was this two occasions?

"A. No. I simply called Bill Ashworth to tell him I had been out there, and he asked me if I would have any objection to speaking with *their lawyer.* I said 'No.'

"Q. Did you speak to a lawyer?

"A. Yes I did.

"Q. At this time you no longer worked for Harper's, did you?

"A. That is right."

(Rose Deposition Tr. 27; emphasis supplied)

Si Goldman of Macmillan testified that his personal counsel was not present when he was interviewed by certain lawyers after his grand jury appearance, that none of the participating lawyers informed Goldman that what he said would be kept confidential, and that Goldman did not request that his statement be kept confidential. (Goldman Deposition Tr. 43)

Along the same lines, Irving Davidson, a salesman for Grosset & Dunlap, testified that when he was interviewed about what occurred before the grand jury it made no difference to him whether his statement was kept confidential or not.[7] (Davidson Deposition Tr. 17)

The claimed existence of a corporate attorney-client privilege depends upon the establishment by the defendants that the particular witness was a member of the group who participated in the corporate problem about which legal advice was sought. Only the affidavits relating to the interviews of Bonsall and Milne even claimed that the grand jury witness was in a position to influence their company's litigation strategy. Accordingly, Judge Decker returned these two debriefing statements unopened, but held that the other debriefing documents were not protected by a corporate attorney-client privilege.

Judge Decker then turned to an analysis of the facts and circumstances presented by the plaintiffs to establish "good cause" and "special circumstances" for the pro-

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[7] The deposition of Irving Davidson shows that the affidavits submitted by the defendants set forth a partial and evasive description of the circumstances that surrounded the witness interviews. Moreover, defense counsel have sought to prevent the witnesses from revealing the circumstances which vitiate the claim of privilege. Plaintiffs have submitted the relevant pages of Davidson's deposition transcript as Exhibit 2.

duction of the debriefing statements as against the qualified protection claimed for the alleged work-product.

Based upon his review of specified deposition testimony and his *in camera* inspection of the grand jury testimony given by the same witnesses, Judge Decker made the following findings of fact which support the showing of "good cause" and "special circumstances" for the production of the debriefing statements:

(a) "Each witness demonstrated a remarkable lack of memory concerning crucial evidence in controversy" and that "what recollection they could muster was often so vague as to be of only limited value." (Memorandum Opinion, pp. 4, 9)

(b) "Some witnesses have been deliberately evasive," "other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence," and the "deposition testimony sometimes conflicts with documentary evidence which the witnesses personally prepared several years ago." (Memorandum Opinion, p. 2)

(c) The recall of each witness was substantially more extensive when he appeared before the grand jury, and that "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect." (Memorandum Opinion, pp. 4, 5)

In this context, Judge Decker enumerated several factors justifying release of the debriefing statements to aid plaintiffs in their search for truth:

> "The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the

intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from 'net' prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances." (Memorandum Opinion, pp. 19-20)

As additional reasons for the discovery order, Judge Decker stated that production of these "documents may substantially refresh future deposition recollection thereby rendering extensive transcript requests unnecessary. Furthermore, the debriefing statements may disclose relevant aspects of the price fixing conspiracy which were not probed by the grand jury, thus supplementing the minutes" released to the plaintiffs. (Memorandum Opinion, p. 11) The significance of this latter finding is graphically illustrated by the following passages from the released debriefing statement of Clarence N. Roland, an ex-employee of Golden Press and Childrens Press.[8]

(a) "*Roland told the debriefers but not the grand jury* that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5) (emphasis supplied)

(b) "Roland was asked [before the grand jury] if he knew of any instance when the American News Company departed from the net price policy. He said

[8] The debriefing statement of Roland is submitted as Exhibit 3.

that he did, and that in connection with one such infraction he called Mr. Harold Williams (now deceased) of American News.

"Roland elaborated on one of his conversations with Harold Williams. On that occasion he talked to Williams concerning American News price cutting, and noted that American News was enjoying a discount from Golden based on their total purchases. American News obtained this discount despite the fact that books were shipped to the various American News Company branches throughout the United States. Roland told Williams if American News did not adhere to the net pricing policy Golden might change its discount policy, and treat each American News branch as a separate distributor. Such revision in Golden's discount policy would seriously curtail American News Company's purchasing power.

"*Roland told the debriefers, but not the grand jury,* that Huyck [the government attorney] probably learned of Roland's conversation with Williams from Mr. Joe Christie of American News." (pp. 3-4) (emphasis supplied)

(c) "Roland told the debriefers he thought it significant that Huyck never asked him if he knew of any agreement among jobbers to hold the net price line." (p. 10)

The District Court balanced the showing of "good cause" and "special circumstances" against the claim that the debriefing statements should remain secret as work-product of the attorneys who recorded the narratives. Applying well-settled and recent precedents to the circumstances disclosed by the affidavits and deposition testimony, Judge Decker concluded that the factors supporting the claim of work-product were weak. Judge Decker specifically found that for the most part, the lawyers "functioned primarily as investigators" or scriveners; that the lawyers sought to reconstruct what had been said

in the grand jury room (as well as those matters either withheld by the witness or not pursued by the grand jury); that the debriefing statements recorded the recollections of the witnesses; that "the debriefing statements are essentially factual summaries of the witnesses' testimony" before the grand jury; and that the affidavits did not assert that the statements included legal analysis or litigation strategy with the exception of one statement (Golden Press "B-1"), which Judge Decker accordingly excluded from discovery.

ARGUMENT

The only issue raised by the petition for writ of mandamus is whether the District Court properly exercised its discretion to order the limited production of relevant and material documents. The defendants contest Judge Decker's findings that (i) the circumstances under which the debriefing statements were taken did not create a confidential attorney-client relationship, and (ii) the plaintiffs established "good cause" and "special circumstances" for discovery of the debriefing statements, which outweighed "defendants' minimal work product claims." Mandamus is clearly an inappropriate remedy to attack such discovery rulings, especially since Judge Decker's order constitutes an exercise of discretion based upon his appraisal of the facts. This latest effort to frustrate and delay discovery should be summarily rejected.

The defendants have advanced no plausible grounds to invoke the extraordinary remedy of mandamus. The order staying release of the debriefing statements pending conclusion of this action has interrupted and disrupted the discovery program in the consolidated antitrust actions. In these circumstances, plaintiffs submit that the petition for writ of mandamus should be dismissed without further briefing of the issues.

I. MANDAMUS WILL NOT LIE TO REVIEW A DISTRICT COURT'S DISCRETIONARY ORDER FOR THE PRODUCTION OF DOCUMENTS BASED UPON THE DETERMINATION OF FACTUAL ISSUES

It has been consistently held that mandamus will not lie to review a trial court's discovery order unless the aggrieved party shows a clear abuse of discretion and establishes an indisputable right to such drastic relief. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *Texas Gulf Sulfur Co.* v. *Ritter*, 371 F.2d 145, 146-147 (10th Cir. 1967). See also *Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964) (appeal denied despite certification of district judge). This doctrine was most recently expressed in *Will* v. *United States*, 389 U.S. 90 (1967), wherein the Supreme Court unanimously reversed the issuance of a writ of mandamus directed against a trial court's discovery order. The opinion stressed that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy," and cautioned that:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer theinselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" At 95; 98, n. 6.

The power to grant the peremptory writ of mandamus is discretionary with the Court of Appeals, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943), and such authority has been used sparingly, especially with respect to rulings upon discovery issues entrusted to the discretion of the trial judge. Thus, courts of appeal have

consistently denied petitions for writ of mandamus to review a finding of good cause for the production of documents. *E.g., Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir.); *stay denied*, 83 S. Ct. 964 (1963) (Harlan, J.); *Paramount Film Distributing Corp.* v. *Civic Center Theatre*, 333 F.2d 358 (10th Cir. 1964); *In re Illinois Central R.R.*, 192 F.2d 465 (5th Cir. 1951) (writ of prohibition); *Keaton* v. *Kennamer*, 42 F.2d 814 (10th Cir. 1930).

In *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.*, 380 F.2d 277, 283 (2d Cir. 1967), petitioners sought a writ of mandamus to vacate a discovery order, alleging that the documents were covered by the work-product doctrine. The court of appeals denied the petition and concluded that the decision of the trial court involved the "application of well-known law to commonplace fact, and rested on the district judge's appraisal of facts and exercise of discretion. Whether the order below was correct or not, these bases for it involved no question of first impression."

The additional grounds cited by the opinion for denying the writ of mandamus apply with equal force to this case:

> "Besides the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts, we feel that the nature of the present litigation presents another compelling reason for our discretionary refusal to entertain the petition. In a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically preclude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges." (At p. 284)

The defendants have not questioned the District Court's judicial power to enter the discovery order, nor charged usurpation of that power. They complain rather that Judge Decker erred by ruling that there was no factual basis for most claims of attorney-client privilege and that "good cause" and "special circumstances" existed for the production of the debriefing statements, even in those few instances where the work-product of an attorney was arguably involved. The finding of good cause and the consequent order to produce documents are matters of judgment and discretion, which required the sifting of affidavits and deposition and grand jury testimony to resolve competing interests. The exercise of this discretion cannot be reviewed piecemeal through mandamus proceedings. *Bank Line, Ltd. v. United States*, 163 F.2d 133 (2d Cir. 1947), *Pennsylvania R.R. v. Kirkpatrick*, 203 F.2d 149, 150 (3d Cir. 1953).

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO ORDER THE LIMITED PRODUCTION OF THE DEBRIEFING STATEMENTS PREPARED BY AND FOR THE DEFENDANTS

The petition for writ of mandamus is nothing more than an attack upon the District Court's factual determinations and exercise of discretion. To support plaintiffs' motion that the mandamus petition be denied without further briefs, this answer will summarize the complete lack of substance in each of the defendants' contentions.

A. The District Court properly held that the circumstances described by the defendants did not create a personal attorney-client privilege with respect to certain debriefing statements.

The defendants complain Judge Decker erroneously concluded that certain debriefing statements were not pre-

pared in the course of a personal attorney-client relationship. The defendants' assertion cannot withstand exposure to the evidence. The circumstances revealed by the affidavits of defense counsel themselves and deposition testimony of the witnesses thoroughly discredit the blanket assertion of personal attorney-client privilege made in the mandamus petition.

The District Court concluded from a study of the evidence that the debriefing statements, with one exception, were not protected by a personal attorney-client privilege, expressly finding that the attorneys did not "*render personal legal advice after the witnesses completed their grand jury testimony.*" (emphasis added) The determination of such factual issues lies in the discretion of the trial judge. There is simply no reason advanced in the mandamus petition to warrant review of this crucial finding. The defendants submitted no proof showing that a confidential attorney-client relationship existed when the debriefing interviews were conducted. None of the affidavits submitted stated or even indicated that the alleged client expected or requested that his disclosure be kept confidential.[9] Indeed, a personal attorney-client privilege was only asserted with respect to some witnesses.

Judge Decker's decision constitutes no departure from established law.[10] He recognized the immunity afforded

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[9] Irving Davidson testified to the contrary. Moreover, the admitted circulation of Callaway's statement to the executives of his company vitiates the claim of attorney-client privilege. See *RCA v. Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955).

[10] He simply applied the black-letter rule that an attorney-client privilege only exists if legal advice is sought in confidence from a professional legal adviser in his capacity as such. 8 Wigmore, *Evidence* § 2292 (3d ed. 1940).

to confidential communications by the attorney-client privilege,[11] but found that the necessary factual indicia of a personal attorney-client relationship were lacking from the record. A disagreement with Judge Decker's appraisal of the evidence does not warrant employment of the extraordinary writ of mandamus.

B. The District Court properly held that the debriefing statements were not protected by the corporate attorney-client privilege.

Judge Decker's rejection of all but two claims of corporate attorney-client privilege accords with the evidence and established case law. The fact that thirteen of the witnesses interviewed were either ex-employees or employees of a different company precludes any assertion of a corporate attorney-client privilege by the defendant company who obtained those debriefing statements.[12]

Judge Decker followed the relevant precedent by ruling that a corporate attorney-client privilege does not extend to interviews with ordinary employees, but only attaches when a responsible member of the corporation's management or control group seeks legal advice about corporate affairs. This test has been consistently applied in recent federal decisions. *E.g., City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483, 485 (E.D. Pa.), *petition for mandamus denied sub. nom., General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); *Natta* v. *Hogan*, 392 F.2d 686, 692 (19th Cir. 1968); *Garrison* v. *General Motors Corp.*, 213

[11] Where factual support for the claim of privilege was presented, Judge Decker ordered that the debriefing statement "be returned unopened."

[12] *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947); *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

F. Supp. 515 (S.D. Cal. 1963). See also *Day v. Illinois Power Co.*, 199 N.E.2d 802, 50 Ill. App.2d 52 (1964).[13] Only two witnesses fell into that class, namely Bonsall and Milne, and their debriefing statements were returned.[14]

Judge Decker's decision turned on a close analysis of facts assembled from numerous detailed affidavits, submitted by defendants themselves. The ruling fully accords with precedent in federal antitrust litigation. By expressly limiting his holding to the unique circumstances of this case, Judge Decker heeded the command in *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963), that the law of corporate attorney-client privilege be applied on a case-by-case basis. The record simply contains no justification for this Court to undertake a review of Judge Decker's well-reasoned exercise of discretion.

C. The District Court properly found that "good cause" and "special circumstances" justified production of the debriefing statements as against the claim of work-product.

Defendants apparently premise their position upon the assertion that the District Court gave too much weight to certain factors in finding good cause and special circumstances. Despite their incantation of the work-product principle, the defendants nowhere contend the discovery order constitutes an abuse of discretion.[15] The failure to

[13] The two earlier cases cited by defendants in support of their contention that the privilege should be expanded may be readily distinguished on their facts.

[14] Since Judge Decker held that the attorney-client privilege covered the only debriefing statement filed by William Morrow & Company, Morrow has no standing to challenge Judge Decker's discovery order.

[15] The extended and hypothetical policy discussions by defendants about the work-product doctrine have no relevance to the facts of this case.

charge abuse of discretion or usurpation of power leaves this Court without jurisdiction to entertain the petition for writ of mandamus.

In any event, Judge Decker's order represents the application of established law to the facts submitted by the defendants. While recognizing that the work-product principle ordinarily protects counsel's legal strategies and thought processes from discovery, the District Court held that the principle did not insulate mere factual summaries of witness interviews. This ruling rests on sound precedent. *E.g., Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D.N.Y. 1951), *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264, 267 (D. Colo. 1963).

Moreover, Judge Decker concluded that even if the debriefing statements contained the work-product of attorneys, the good cause and special circumstances for disclosure outweighed the reasons to maintain the secrecy of these statements.

Comparison of a few excerpts from the debriefing statement and deposition transcript of Clarence N. Roland demonstrates the validity of Judge Decker's finding of special circumstances and emphasizes the need for production in the search for the truth.

a) The debriefing statement recites:

"Roland told Williams if American News did not adhere to the net pricing policy Golden [Press] might change its discount policy, and treat each American News branch as a separate distributor. Such revision in Golden's discount policy would seriously curtail American News Company's purchasing power." (p. 4) But at Roland's deposition, the following colloquy occurred:

"Q. Now I am asking whether . . . you suggested to any official of American News that if the various branches of American News persisted in discounting

Simon & Schuster [Golden Press] books, that Simon & Schuster might refuse to give American News a mass buying discount on all its branches but would, instead, credit each branch only with the purchases that it made?

"A. No." (Tr. p. 18)

b) The debriefing statement recites:

"Roland told the grand jury that the American News Company 'stayed in line' after his talk with Williams." (p. 5)

However, Roland responded as follows in his deposition:

"Q. And were there instances where, after you had spoken to a jobber, his behavior improved?

* * *

"A. Not so that you could notice if you are referring to adhering to our pricing." (Tr. p. 14)

c) The debriefing statement recites:

"He [Roland] said he had threatened to lose the orders of discounting jobbers. . . . Roland told the debriefers but not the grand jury that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5)

The deposition testimony of Roland was quite different:

"Q. While you were with Simon & Schuster, to your knowledge, was an order sent in by any jobber ever lost or delayed for a time in an effort to get a message across to the jobber?

* * *

"A. No. * * *" (Tr. pp. 19-20)

"Q. . . . Is it your testimony that you recall no instance in which, to your knowledge, Simon & Schuster delayed delivery or lost an order of a jobber because of his discounting activities?

"A. That is correct. * * * we have never, as you have phrased it, lost an order because someone has

not adhered or sold at the net selling price as we suggested." (Tr. pp. 37-8)

d) The debriefing statement recites that Ted Winter and Wally Black of Childrens Press gave Ronald specific instructions "to report violations of the net price policy" and that Roland "followed these instructions." (pp. 6-7)

Once again, Roland's deposition testimony was quite different:

"Q. Did you have any instructions from Mr. Black or Mr. Winter that if there were instances of jobbers selling Children's Press books at less than net price that you should report such incidents?

"A. No, sir." (Tr. p. 31)

Judge Decker weighed the need for discovery against work-product-claims on the basis of standards enunciated in a series of federal decisions. *United States* v. *Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F. Supp. 736, 741 (N.D. Ill. 1962); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 207 F. Supp. 407, 410-411 (M.D. Pa. 1962). See *Hauger* v. *Chicago, Rock Island & Pacific R.R.*, 216 F.2d 501, 507 (7th Cir. 1954). The consequent determination that the circumstances warranted disclosure of the debriefing statements is fully supported by the evidence presented to the District Court, and by the applicable law. This finding presents no issue which is cognizable upon a mandamus petition.

CONCLUSION

For the reasons set forth above, respondents-plaintiffs respectfully request that the Petition for Writ of Mandamus be denied, that this Court's order of October 28, 1969, be amended by striking the schedule for filing of briefs, and that an order be entered taxing petitioners-defendants with all costs and expenses incurred in presenting this answer.

(Names of counsel omitted)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, October 20, 1969

Before

Hon. Thomas E. Fairchild, Circuit Judge

Harper & Row Publishers, Inc., et al., Petitioners,		Original Petition for Writ of Mandamus.
No. 18098	vs.	
Honorable Bernard M. Decker, United States District Judge, Respondent.		

On consideration of the emergency motion of petitioners, Harper & Row Publishers, Inc., et al., to stay the order entered in the United States District Court for the Northern District of Illinois, Eastern Division, on October 17, 1969, presented to this Court this day in connection with a petition for writ of mandamus,

It Is Ordered that the said order of October 17, 1969, entered by Honorable Bernard M. Decker, United States District Judge, in case No. 67-C-1899 entitled *State of Illinois*, Plaintiff *v. Harper & Row Publishers, Inc., et al.*, Defendants, and related cases, be stayed pending the final disposition by this Court of the petition of Harper & Row Publishers, Inc., et al. for writ of mandamus.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 29, 1969

Before

Hon. Roger J. Kiley, Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

Hon. Walter J. Cummings, Circuit Judge

Harper & Row Publishers, Inc., et al.,

Petitioners,

No. 18008 vs.

Honorable Bernard M. Decker, United States District Judge, et al.,

Respondents.

Original Petition for Writ of Mandamus

ORDER

On consideration of the motion of respondents (plaintiffs below) for clarification of stay order, and the response of petitioners,

It Is Ordered that the stay order entered herein October 20, 1969 is modified so as to permit the release, pursuant to the October 17, 1969 order of Judge Decker which is the subject of our stay order, of the "debriefing statements" taken by attorneys for Children's Press, Inc.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 JANUARY SESSION, 1970

No. 18008

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

v.

HONORABLE BERNARD M. DECKER, United States District Judge,

Respondent.

Petition for Writ of Mandamus

February 4, 1970

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges.*

PER CURIAM. In more than forty separate antitrust actions brought in eight judicial districts, plaintiffs, state and local governments, public schools, and public libraries, sought damages from twenty-three defendants (petitioners here), publishers and wholesalers, for alleged conspiracies to inflate the prices for children's editions of library books. Pursuant to 28 U.S.C. §1407 these actions were transferred for consolidated discovery and pretrial proceedings to the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Bernard M. Decker, presiding. Petitioners seek mandamus to compel the district judge to vacate an order dated October 17, 1969 insofar as it permitted plaintiffs to inspect and copy certain memoranda, all but one of

which were prepared by attorneys while "debriefing" a number of persons (each an employee or former employee of one of petitioners) shortly after each had testified before a federal grand jury investigating various aspects of the publishing industry.

Plaintiffs sought production of these memoranda under Rule 34, F.R.C.P. Petitioners countered with the claim that the debriefing memoranda were protected by the attorney-client privilege or as attorneys' work product. The judge ordered petitioners to submit the memoranda under seal, and to file a precise factual statement setting forth the circumstances of the preparation of each.

The judge did not examine the memoranda. In every instance but two, he decided that neither an attorney-client privilege nor any status as work product excused discovery.

The judge refused to make a certification under 28 U.S.C. §1292(b), for the purpose of appeal. Petitioners sought mandamus, and because an appeal, ultimately, from the final decision would be an inadequate remedy, we ordered an answer and briefs.

The claims made by petitioners fall under the following topics: (1) Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged. (2) Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged. (3) Whether the memoranda were protected work product of the attorney. (4) Whether good cause was shown for discovery of work product.

(1) *Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged.*

The judge had before him assertions on this point in affidavits and depositions. In at least three instances

(Davidson, Rose and Rowe), there was a difference between the statement of the attorney and of the person interviewed which raised a degree of ambiguity. There was at least one assertion of the existence of a personal attorney-client relationship with respect to Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Stokes, Street, Davidson, Rose, Rowe, Callaway, and witnesses "A" and "B" of Golden Press.

The judge decided that there was no personal attorney-client relationship in these instances because it failed to appear that the attorney did (1) render personal legal advice to the witnesses, (2) advise them on personal matters, or (3) bill them for services. He concluded that the witnesses talked to the attorneys as a favor to the respective corporations.[1]

Petitioners can not assert the privilege of the individuals, if such privilege existed. The attorneys could presumably assert their obligation to the individuals, although the attorneys are before this court only as counsel for petitioners.

In any event we do not find the existence of personal attorney-client relationships so clearly established that mandamus is appropriate to compel the district court to recognize the privilege which would arise therefrom.

(2) *Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged.*

Some of the persons interviewed were no longer employees at the time of the interview; others were employed by one of petitioners at the time of interview, but were interviewed by counsel for another petitioner. Neither group need be considered under this topic.

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[1] The Bonsal memorandum is not involved in this proceeding. The judge found a personal attorney-client relationship and held the memorandum privileged.

Messrs. Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker were employees of the corporate client at the time of the interview. It is sufficiently clear that each employee made his disclosure to the attorney at the direction of his corporate employer and on its behalf; and that the subject matter of his grand jury testimony and of the debriefing interview was germane to the duties of his employment. On the other hand, although some of these employees had supervisory or even policy making responsibilities with respect to the branch of the corporate business with which they worked, it was not demonstrated that any of these employees was in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, nor that he was a member of a group having that authority.[2]

The district judge substantially followed the "control group" test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962) 210 F.Supp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.

If the control group test be wholly adequate, it has not been shown that the district judge erred in his application of it.

Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th Cir., 1969), 392 F.2d 686, 692; *Garrison* v. *General Motors Corp.* (S.D.,

[2] The Bonsal and Milne memoranda are not involved in the present proceeding. The judge found that Bonsal and Milne were members of the control group of their employer and held their communications privileged.

Cal., 1963). 213 F.Supp. 515. It has been criticized. Burnham, Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois, 56 Ill. B.J. 542, 545-48 (1968); Heininger, The Attorney-Client Privilege as it Relates to Corporations, 53 Ill. B.J. 376, 384 (1965). Broader tests have been suggested. See Pye, Fundamentals of the Attorney-Client Privilege, 15 Prac. Law. 15, 19 (Nov. 1969); Maurér, Privileged Communication and the Corporate Counsel, 28 Ala. Law. 352, 375 (1967); *D. I. Chadbourne, Inc. v. Superior Court* (1964), 36 Cal. Rptr. 468, 388 P.2d 700, 709.

We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.

It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.

We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

And because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.

(3) *Whether the memoranda were protected work product of the attorney.*

We think that the district judge incorrectly suggested that some of the memoranda did not qualify as work product because "the lawyers functioned primarily as investigators." Where an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator. See *Hauger* v. *Chicago, Rock Island, and Pacific R. Co.* (7th Cir., 1954), 216 F.2d 501; *United States* v. *American Optical Co.*, 37 F.R.D. 233, 238 (E.D. Wis., 1965); *United States* v. *Aluminum Co. of America*, 34 F.R.D. 241, 242-3 (E.D. Mo., 1963). Indeed, the qualified privilege might even attach to a document prepared under the supervision of the attorney even though not drafted by the attorney himself. *Alltmont* v. *United States* (3rd Cir., 1950), 177 F.2d 971; cert. den. 339 U.S. 967 (1950). Of course, the less the lawyer's "mental processes" are involved, the less will be the burden to show good cause. *United States* v. *Swift & Co.* (N.D. Ill., 1959), 24 F.R.D. 280, 284.

(4) *Whether good cause was shown for discovery of work product.*

The judge made specific findings of good cause for permitting plaintiffs to examine the grand jury testimony of nine of the person who were later interviewed by the attorneys. Three of them are not involved in the present proceeding. The debriefing memoranda of five of them, Callaway, Dyckman, Hood, Sciosia and Thompson, we have held protected by the attorney-client privilege of their employers. Rust is the one remaining. The judge found, from comparison of his deposition with his grand jury testimony, that there were material discrepancies and failures to recall significant facts. It seems clear that, insofar as the character of this memorandum as work product remains relevant, good cause was properly found.

We are unable to determine whether the district judge inspected any depositions other than those taken from the above mentioned nine. As to the remaining memoranda, the determination of good cause seems to rest generally on a finding that a six year lapse of time would inevitably cause memories to dull coupled with findings apparently based on conclusions regarding the deficiencies of the nine depositions examined. In these instances more specific findings as to each individual would have been better. See *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.* (7th Cir., 1954), 216 F.2d 501, 505. We conclude, however, that lack of good cause has not been made to appear sufficiently for issuance of a writ of mandamus. Thus the order under attack will stand as to all debriefing memoranda except in those instances where we have determined in part (2) above that the corporation's attorney-client privilege protects from discovery.

A writ of mandamus will issue compelling respondent district judge to exempt from his order of October 17, 1969, the debriefing statements of the following: Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker, and to order the return of each of those debriefing statements to the defendant which produced it. In all other respects the petition for mandamus is denied. Petitioners are to submit a proposed writ following the procedure prescribed by Rule 19 F.R.A.P. for settlement of judgments enforcing orders of agencies.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, February 4, 1970

Before

Hon. Roger J. Kiley, Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

Hon. Walter J. Cummings, Circuit Judge

No. 18008.

Harper & Row Publishers, Inc., et al., Petitioners,

vs.

Honorable Bernard M. Decker, United States District Judge, Respondent.

Petition for Writ of Mandamus.

This cause came before the Court on the petition for writ of mandamus, answer thereto, and briefs of the parties.

On consideration whereof, It Is Ordered And adjudged by this Court that a writ of mandamus will issue compelling respondent district judge to exempt from his order of October 17, 1969, the debriefing statements of the following: Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company, Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker, and to order the return of each of those debriefing statements to the defendant which produced it.

It Is Further Ordered and adjudged by this Court that in all other respects the said petition for writ of mandamus is denied.

Petitioners are to submit a proposed writ following the procedure prescribed by Rule 19 F.R.A.P. for settlement of judgments enforcing orders of agencies, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, February 11, 1970

Before

Hon. Roger J. Kiley, Circuit Judge

Harper & Row Publishers, Inc., et al., Petitioners, vs. Honorable Bernard M. Decker, United States District Judge, Respondent.	No. 18008	Original Petition for Writ of Mandamus.

On consideration of the motion of counsel for respondents,

It Is Ordered that the issuance of the writ of mandamus be stayed for a period of thirty (30) days from this date, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure, pending application of respondents to the Supreme Court of the United States for a writ of certiorari and until final disposition thereof.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 11, 1970

Before

Hon. Roger J. Kiley, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

Harper & Row Publishers, Inc., et al., Petitioners,		Petition for Writ of Mandamus
No. 18008	vs.	
Honorable Bernard M. Decker, United States District Judge, et al., Respondents.		

ORDER

On February 4, 1970 an opinion was filed deciding that a writ of mandamus will issue and directing settlement of the form of the writ (see Rule 36, F.R.A.P.) upon submission of a proposed writ by petitioners, following the procedure prescribed by Rule 19, F.R.A.P. for settlement of judgments enforcing orders of agencies.

On February 12, 1970, petitioners filed a proposed writ of mandamus. Respondents did not file a counter proposal pursuant to Rule 19, F.R.A.P. Except for one matter, herein referred to as the Andresen memorandum, the writ proposed by petitioners is deemed to conform with our opinion.

The Andresen memorandum.

On February 12, petitioners filed a motion asking that we include the debriefing memorandum of Bruce Andresen among those listed in our opinion and our writ, to be exempted from respondent's order of October 17, 1969 and to be returned to the defendant which produced it. Petitioners assert that Bruce Andresen was an employee of petitioner Baker & Taylor Co. and that his debriefing memorandum is protected by the attorney-client privilege of Baker & Taylor Co., the same as that of Hood, Moorman, and Thompson. Respondents assert that Andresen was formerly employed by Golden Press, and we note that petitioners include in the proposed writ the statement taken from grand jury witness Golden Press "B-1", but petitioners claim that their motion relates only to the debriefing memorandum of Andresen given to counsel for Baker & Taylor Co.

We prefer to leave the resolution of any factual dispute to the district court. The writ of mandamus in final form will not include Andresen (nor Golden Press "B") in the list of grand jury witnesses the debriefing statements of whom will be ordered returned, but will include a direction that: "With respect to witness Bruce Andresen, the Honorable Bernard M. Decker shall determine whether, consistently with part (2) of our opinion, Andresen's debriefing memorandum produced by Baker & Taylor, or Golden Press 'B-1', is protected by the attorney-client privilege of Baker & Taylor Co., and shall deal with it accordingly."

The Rust and Mathiesen memoranda.

Two petitioners ask for clarification and modification of our opinion so as to compel respondent to order the

return of the debriefing memoranda of Paul Rust and John Mathiesen. These men were not employed by any of petitioners, but by another corporation, E. M. Hale & Co. It is claimed that Hale was an agent of two petitioners, and therefore that the attorney-client privilege of these two petitioners protects the communication between Rust and Mathiesen and petitioners' attorneys. Petitioners note that our opinion dealt with certain communications by an employee of the corporation asserting the privilege and did not refer to such communications by an agent who was not an employee. But whether or not a corporation's privilege will extend to a communication by its own agent who is not its employee, we are satisfied that the particular relationship of Rust and Mathiesen to the corporate petitioners does not entitle petitioners to protection against disclosure of the Rust and Mathiesen communications with petitioners' attorneys.

Costs.

Petitioners and respondents each seek allowance of costs in this proceeding in this court, virtually as if it were an appeal, subject to Rule 39 F.R.A.P. Petitioners seek $2,586.96 and respondents $1,141.13. Rule 39 is not literally applicable. We did not include any direction as to costs in our opinion, the petition was granted in part, denied in part, and we conclude in our discretion that no party is to recover costs in this proceeding in this court.

Accordingly, It Is Ordered,

(1) The form of the writ of mandamus will be as proposed by petitioners February 12, 1970, except (a) the name "Golden Press 'B-1'" will be omitted from the 6th and 7th lines from the bottom of page 2 and the name "Andresen" will be omitted from the third line from the

bottom of page 2 and (b) there shall be added an additional paragraph, as follows:

"With respect to witness Bruce Andresen, the Honorable Bernard M. Decker shall determine whether, consistently with part (2) of our opinion, Andresen's debriefing memorandum produced by Baker & Taylor Co. or Golden Press 'B-1' is protected by the attorney-client privilege of Baker & Taylor Co., and shall deal with it accordingly."

(2) Said writ shall not, however, be issued before expiration of the stay ordered February 11, or any extension thereof.

(3) The application of petitioners to add the Rust and Mathiesen memoranda to the list of those protected from discovery by our writ of mandamus is denied.

(4) the applications of the parties for recovery of costs are each denied.

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

(and related cases)

[STATEMENT RELATING TO MORRIS STOKES, CHARLES SCRIBNER'S]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of children's books.

(2) On September 19, 1966, I accompanied Morris Stokes, then Director of Library Services of Charles Scribner's Sons, to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Stokes in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Stokes' responses to my questions and on October 6, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Jra M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or to his corporate employer.

(4) At the time Mr. Stokes appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Charles Scribner's Sons which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Stokes and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 6, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 6, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

In The United States District Court

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO FRANK SCIOSIA, HARPER & ROW]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 9, 1966, I accompanied Frank Sciosia, then sales manager of Harper & Row Publishers Incorporated, to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Sciosia in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Sciosia's responses to my questions and on October 7, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or to his corporate employer.

(4) At the time Mr. Sciosia appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both, him and his corporate employer, Harper & Row Publishers Incorporated which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Sciosia and me were in confidence and were made to me in my capacity as as attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 7, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 7, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO EDWARD PATELLA, GROSSET & DUNLAP]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 9, 1966, I accompanied Edward Patella, then a salesman for Grosset & Dunlap, Inc., to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Patella in an attempt to reconstruct, to the best of his

recollection, his testimony before the Grand Jury. I took notes of Mr. Patella's responses to my questions and on October 6, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or to his corporate employer.

(4) At the time Mr. Patella appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Grosset & Dunlap, Inc. which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Patella and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 6, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 6, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO ROBERT GUERNEY, HARPER & ROW]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 23, 1966, I accompanied Robert Guerney, then a salesman of Harper & Row Publishers Incorporated, to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Guerney in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Guerney's responses to my questions and on October 5, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or his corporate employer.

(4) At the time Mr. Guerney appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Harper & Row, Publishers, Incorporated which, we had reason to

believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Guerney and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his coroporate employer, and thus my memorandum of October 5, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 5, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO IRVING DAVIDSON, GROSSET & DUNLAP]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On September 19, 1966, I accompanied Irving Davidson, then a salesman for Grosset & Dunlap Inc., to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Davidson

in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Davidson's responses to my questions and on October 6, 1966 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or his corporate employer.

(4) At the time Mr. Davidson appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, Grosset & Dunlap, Inc. which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Davidson and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 6, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 6, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—67 C 1899 And related cases)

[STATEMENT RELATING TO
JAMES F. HEIDELBERGER, E. P. DUTTON]

Donald J. Williamson, being duly sworn, deposes and says:

(1) I am one of the attorneys who was assigned by the law firm of Weil, Gotshal & Manges to render legal advice sought by certain witnesses who appeared before a Federal Grand Jury convened by the United States District Court for the Northern District of Illinois to investigate the publication and distribution of library editions of childrens books.

(2) On October 26, 1966, I accompanied James F. Heidelberger, then sales manager of E. P. Dutton & Co. Inc., to Chicago for his appearance before said Grand Jury. Immediately after his appearance, I interrogated Mr. Heidelberger in an attempt to reconstruct, to the best of his recollection, his testimony before the Grand Jury. I took notes of Mr. Heidelberger's responses to my questions and on October 27, 1969 I reduced those notes to a formal memorandum embodying therein certain of my thought processes and impressions.

(3) The original of this memorandum was sent to the files of Weil, Gotshal & Manges. Copies of the memorandum were sent to Ira M. Millstein and Irving Scher, who were also attorneys of Weil, Gotshal & Manges responsible for the matter. No copy of the memorandum was sent to the witness or his corporate employer.

(4) At the time Mr. Heidelberger appeared before the Grand Jury, Weil, Gotshal & Manges was acting as counsel for both him and his corporate employer, E. P. Dutton & Co., Inc. which, we had reason to believe, was then one of the targets of the investigation.

(5) I respectfully submit that all communications between Mr. Heidelberger and me were in confidence and were made to me in my capacity as an attorney associated with Weil, Gotshal & Manges, his personal counsel as well as counsel for his corporate employer, and thus my memorandum of October 27, 1966, reflecting such confidential communications, is absolutely exempt from civil discovery as being within the attorney-client privilege. My memorandum of October 27, 1966 is exempt from civil discovery on the further ground that it is my attorney's work product, inasmuch as it reflects my mental processes and impressions reduced to writing for use in pending and impending legal proceedings.

/s/ Donald J. Williamson

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899 and related cases)

STATEMENT OF GOLDEN PRESS, INC.
[RELATING TO WITNESSES "A", "B" AND "D"]

Pursuant to this Court's order of August 7, 1969 and its directions given in proceedings of that date, we submit herewith a sealed envelope containing debriefing memoranda with respect to witnesses who testified before the grand jury referred to in the August 7, 1969 proceedings and order, to wit, Northern District of Illinois 66 GJ 3003. The documents have been marked for identification with the letters "A," "B," "B-1," "C," "D," and "E" respectively.

We strongly urge that disclosure of such documents in this litigation should be denied, since disclosure would violate the attorney-client privilege and the law concerning work-product of counsel.

None of the documents was shown to persons other than counsel.

The circumstances under which each document was prepared are as follows:

Document A. The witness was an employee of Golden Press, Inc. at the times of his testimony and debriefing. He was debriefed by Myron M. Cherry, presently a partner and then an associate, in the law firm McDermott, Will & Emery, which is counsel for Golden Press, Inc. and also acted as counsel for the witness. Further, the witness was a regional sales manager of Golden Press, Inc. and therefore was acting for Golden Press, Inc. in making communications to and receiving advice from counsel.

The day before the witness was scheduled to appear before the grand jury, Mr. Cherry and I conferred with him to advise him with respect to grand jury procedure and his legal rights. We also questioned him in order to determine the facts within his knowledge, told him to answer all questions truthfully to the best of his recollection, and advised him with respect to his right to immunity from prosecution which would derive from his testimony under subpoena, and as to possible legal issues as they might affect him, personally, and his employer Golden Press, Inc.

Immediately after completing his testimony before the grand jury, the witness met with Mr. Cherry in our offices. No one else was present at the meeting except my secretary, who took the notes and typed the enclosed memorandum. The memorandum was dictated primarily by counsel, Mr. Cherry, rather than by the witness. The procedure, essentially, was that Mr. Cherry asked the witness whether government counsel asked certain questions or referred to certain documents and discussed the wit-

ness' recollection with respect thereto. After each of counsel's questions was answered, *counsel* dictated the contents in the form of a question and answer, as appears in the memorandum. Thus, the memorandum consists of dictation by counsl based upon communications from his client, given in answer to counsel's questions. In addition, the memorandum contains reflections and opinions of counsel commenting upon the information received from the witness.

The memorandum was typewritten in the late afternoon and early evening, and to the best of our recollection, the witness never saw it. Moreover, nobody except counsel ever saw the memorandum.

Documents B and B-1. The witness was a former employee of Golden Press, Inc., and at the time of his testimony and for approximately six months prior thereto was an employee of a co-defendant in the captioned litigation. At the time of his testimony and debriefing, the witness, as well as Golden Press, Inc., and the witness' then current employer were all potential co-defendants in government and private litigation involving library editions of children's books, the subject of the grand jury inquiry.

The witness specifically requested that we counsel him in conjunction with advice he was receiving from his other counsel, who was also his then employer's counsel. Thus, we were acting both as counsel for Golden Press, Inc. and co-counsel for the witness.

On the day prior to his appearance before the grand jury, Myron M. Cherry and I met with the witness at the offices of his other counsel, who were also present, to advise him with respect to his constitutional rights and grand jury procedure. We also ascertained by questioning the witness such information as he had with respect

to library editions of children's books. In accordance with our regular practice, we notified the witness of his right to immunity from prosecution based upon his testimony under subpoena and advised him to answer all questions truthfully, to the best of his recollection. Counsel also advised him generally as to possible legal issues involved in the grand jury investigation as they might affect him personally or his employer or former employer.

After the witness completed his testimony before the grand jury, he met at the offices of his other counsel with said counsel and with Mr. Cherry of our firm. Nobody else was present at that meeting. Both counsel asked questions of the witness and made comments concerning the information given by the witness. The interview was conducted substantially on a question and answer basis, and the conference was recorded. There were frequent periods during which counsel entered into extended discussion with each other.

The information obtained from the witness concerning his testimony before the grand jury, thus, was obtained briefly as a result of counsel's questions.

At the conclusion of the meeting, it was agreed by Mr. Cherry and the witness' other counsel that the latter would have the recorded material transcribed and revised into a memorandum form. We have no direct knowledge as to whether other counsel showed the memorandum to the witness, but, pursuant to an understanding between counsel, we received from them a draft summarizing the aforesaid conference with the witness. This draft is enclosed under seal. We have no other document relating to that witness' testimony, but it is our understanding that the enclosed document was intended to be only a rough draft.

Two days after the witness testified, Mr. Cherry of our office wrote a memorandum to the file, a page and a half

of which contained Mr. Cherry's own recollections and observations with respect to the information he had obtained from the witness concerning his testimony before the grand jury. We enclose a copy of that page and a half, and have marked it as Exhibit B-1. That document was the work product of Mr. Cherry and also contains information constituting confidential communications by client to attorney.

Document D. The witness was a former employee of a predecessor of Golden Press. He also was a former employee of a different co-defendant publisher. At the times of his testimony before the grand jury and the preparation of the enclosed debriefing memorandum, he was employed by a still different company, which, however, is also a defendant in the captioned cases, and which, at the times of the testimony and memorandum, was a potential co-defendant with Golden Press and the other publisher referred to, as well as with the witness, in prospective government and private litigation involving library editions of children's books.

After the witness testified before the grand jury, he was interviewed jointly by Mr. Cherry of our firm and counsel for both the aforementioned co-defendants. Mr. Cherry participated actively in questioning the witness and eliciting the information contained in the memorandum. The memorandum in our files was prepared by one of co-defendant's counsel (the then current employer's counsel) after the aforesaid conference and forwarded to us as counsel for a prospective co-defendant. The document contains comments of the witness and of counsel on matters beyond the content of the testimony before the grand jury. Such communications are privileged communications between client and attorney, and the furnish-

ing of a copy to counsel for co-defendant Golden Press did not cause a waiver of that privilege, since it was an act of cooperation by counsel for prospective co-defendants.

Further, because the memorandum is replete with comments by counsel, its essential content represents the work-product of counsel.

The memorandum was not disclosed to anybody except counsel.

For the foregoing reasons, the memorandum is protected against discovery by the attorney-client privilege, which we understand is being asserted by counsel for the witness and for the co-defendant, and by the work-product doctrine.

Samuel Weisbard

UNITED STATES DISTRICT COURT

(Caption — No. 67 C 1899 And Related Cases)

STATEMENT OF DEFENDANT THOMAS J. CROWELL COMPANY, INC., CONCERNING A MEMORANDUM RELATING TO THE GRAND JURY TESTIMONY OF LESLIE ROWE

1. This statement concerns a file memorandum dated October 11, 1966, prepared by R. Andrew Boose, Esq., an attorney associated with the firm of Greenbaum, Wolff & Ernst, counsel for defendant Thomas Y. Crowell Company, Inc. (hereinafter referred to as "the memorandum"). The memorandum relates to the testimony of Leslie Rowe, Assistant Sales Manager of defendant Thomas Y. Crowell

Company, Inc. before a Federal Grand Jury in Chicago, Illinois on September 21, 1966. A Xerox copy of the memorandum was filed with the Court under seal on August 21, 1969.

2. Defendant Thomas Y. Crowell Company, Inc. objects to disclosure of the memorandum to plaintiffs herein (a) because the confidentiality of the memorandum is protected by the attorney-client privilege, and (b) because the memorandum embodies the work-product of Messrs. Greenbaum, Wolff & Ernst, counsel for defendant Thomas Y. Crowell Company, Inc.

3. Mr. Boose prepared the memorandum to record the events which transpired at his October 11, 1966 meeting with Mr. Rowe and Maurice C. Greenbaum, Esq., a partner in the firm of Greenbaum, Wolff & Ernst; no other person was present at that meeting. That meeting was held to enable Mr. Rowe to inform Messrs. Greenbaum and Boose (acting as counsel for defendant Thomas Y. Crowell Company, Inc.) about the substance of his grand jury testimony, so that Messrs. Greenbaum and Boose (and their firm) could provide appropriate legal advice to defendant Thomas Y. Crowell Company, Inc. with respect to certain matters which were then pending.

4. The memorandum records Mr. Boose's recollection of what transpired at that October 11, 1966 meeting, and it also records Mr. Boose's observations, comments and impressions about Mr. Rowe's report of his appearance before the grand jury. The memorandum also reflects the manner in which Messrs. Greenbaum and Boose conducted the meeting and questioned Mr. Rowe, and it thereby reflects their judgment regarding the relative importance of the various subjects which were discussed during that meeting. In addition, the arrangement of the memorandum, the particular information which it contains, the emphasis

which it places upon certain subjects, and the underlinings and marginal notations which appear on its face, all reflect Mr. Boose's judgment regarding the significance of the matters which are reported therein.

5. The memorandum has not been shown to, or read by, any individual other than attorneys associated with the firms of Greenbaum, Wolff & Ernst and Mayer, Friedlich, Spiess, Tierney, Brown & Platt (which firms are counsel for defendant Thomas Y. Crowell Company, Inc. in New York and Chicago respectively), and those attorneys have reviewed the document only in their role as such counsel. No copy of the memorandum ever was given to Thomas Y. Crowell Company, Inc., and neither Mr. Rowe nor any other individual at Thomas Y. Crowell Company, Inc. has seen the memorandum.

/s/ Lee N. Abrams

IN THE UNITED STATES DISTRICT COURT

(Caption — No. 67 C 1899 And Related Cases)

[STATEMENT RELATING TO JOHN M. CALLAWAY, G. P. PUTNAM'S SONS]

DAVID W. SLOAN, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the law firm of Parker, Duryee, Zunino, Malone & Carter, 1 East 44th Street, New York, New York, counsel for G. P. Putnam's Sons, a New York corporation.

2. This affidavit is submitted in compliance with the Court's order of August 7, 1969, granting Plaintiffs' Rule 34 motions dated July 28, 1969. It constitutes a factual

statement setting forth the circumstances of preparation of the undated memorandum, 5 pages in length, which is attached hereto as Exhibit A.

3. On behalf of my firm and my clients, I submit that the Plaintiffs are not entitled to examine the memorandum attached hereto as Exhibit A, based upon the attorney-client privilege and the work product doctrine.

4. Mr. Callaway was employed as the Institutional Manager of G. P. Putnam's Sons from June, 1962 through June, 1966 and was Sales Manager of G. P. Putnam's Sons from July, 1966 to July, 1968. The Institutional Manager is responsible for developing sales in the general institutional market which includes local, state and federal educational and library markets. He is additionally responsible for the recruitment and training of sales personnel of the corporation. The Sales Manager of the corporation is responsible for supervising the activities of the Institutional Manager as well as the activities of the Sales Managers in other areas of the corporation's interests and the managers of advertising, publicity and promotion of the corporation's books. In addition, Mr. Callaway was a Vice President in charge of sales and Assistant Secretary.

5. Sometime prior to Mr. Callaway's testimony before a Grand Jury in Chicago, Illinois on September 14, 1966, he called to advise me that he had received a subpoena to make an appearance before the Grand Jury and asked me to advise him as to his rights, duties and obligations in respect thereto. In addition, my firm was acting at that time as counsel for his employer, G. P. Putnam's Sons. In response to Mr. Callaway's requests and in furtherance of the interests of his employer whom we represented, I met with Mr. Callaway prior to his testimony to discuss

the subpoena. As a result of that meeting and pursuant to my instructions, Mr. Callaway immediately after his testimony on September 14, 1966 returned to his hotel room in Chicago, Illinois and typed the memorandum which is attached hereto as Exhibit A.

Upon his return to New York, he met with me and my partner, James G. Bernheim, to discuss his testimony and to answer certain questions we had. The handwritten notations appearing on the memorandum are those of Mr. Bernheim and were written as a result of the answers furnished by Mr. Callaway to our questions. This meeting in New York City occurred at the offices of my firm sometime in September, 1966.

Other than my partner, James G. Bernheim, and other attorneys representing G. P. Putnam's Sons in the various treble damage actions which have been commenced since 1966 and in which G. P. Putnam's Sons is a party, no other person has read the contents of this document other than Mr. Walter J. Minton, President of G. P. Putnam's Sons and Mr. Victor C. Thaller, Vice President and Treasurer of G. P. Putnam's Sons. In connection with my firm's representation of that corporation, I furnished a copy of the same to each of such officers for their analysis and comment. However, no other person other than my secretary, to my knowledge, has seen such memorandum.

/s/ David W. Sloan

IN THE UNITED STATES DISTRICT COURT

(Caption — Civil Action No. 67 C 1899

And/Or Related Cases)

AFFIDAVIT OF BRINTON P. ROBERTS, ESQ. [RELATING TO JOE WALKER, HOUGHTON MIFFLIN CO.]

BRINTON P. ROBERTS, being duly sworn, deposes and says as follows:

1. He is an attorney admitted to practice before the Courts of the Commonwealth of Massachusetts, the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit and that he is presently and has, since September 1965, been associated with the law firm of Choate, Hall & Stewart ("Choate Hall").

2. Choate Hall is, and has been since prior to 1966, general legal counsel for Houghton Mifflin Company ("Houghton Mifflin"). As such, Choate Hall in the summer of 1966 was requested by Houghton Mifflin to represent and counsel Houghton Mifflin with respect to subpoenae received by Houghton Mifflin in connection with a grand jury investigation instituted in the Northern District of Illinois and with respect to any and all matters related to or arising out of said investigation. Choate Hall has represented and counselled, and is representing and counselling, Houghton Mifflin in connection with all said matters, including the legal proceedings in which this affidavit is to be filed, and affiant has personal knowledge of said matters.

3. During the summer of 1966 the law firm of Kirkland, Ellis, Hodson, Chaffetz and Masters of Chicago, Illinois ("Kirkland Ellis") was retained to assist Choate Hall in representing and counselling Houghton Mifflin in connection with said grand jury investigation. Houghton Mifflin

was billed by Kirkland Ellis for said services and has paid said bill.

4. Affiant is informed and believes that on September 19, 1966 in rendering the legal services requested of Kirkland Ellis, Attorney Frank Cicero, Jr., an associate of Kirkland Ellis, interviewed Joe Walker, the then Manager of the Institutional Department of Houghton Mifflin, following Joe Walker's appearance before said grand jury, in the offices of Kirkland Ellis, at which interview were present only Joe Walker, Attorney Cicero and perhaps Attorney Fred H. Bartlit, Jr., a partner in Kirkland Ellis.

5. Affiant is informed and believes that following said interview Attorney Frank Cicero caused to be prepared six (6) copies of a memorandum setting forth Attorney Frank Cicero's recollection of the interview, of which four (4) copies were retained by Kirkland Ellis and were, following the completion of the services of Kirkland Ellis, destroyed in the normal course of business without being disclosed to anyone other than partners or associates of Kirkland Ellis.

6. Kirkland Ellis caused to be delivered to Choate Hall the other two (2) copies of the said memorandum. Said two (2) copies are in the files of Choate Hall and have not been examined by anyone other than partners or associates of Choate Hall.

7. Three (3) copies of one of the two (2) copies of said memorandum have been made by Choate Hall for the following purposes:

(a) One to be filed as required by the order, dated August 7, 1969, of the Court in which this affidavit is to be filed;

(b) One to be delivered to the law firm of Mayer, Friedlich, Spiess, Tierney, Brown & Platt of Chicago, Illinois, ("Mayer Friedlich") presently counsel for Houghton Mifflin in connection with the legal proceedings for which this affidavit is prepared; and

(c) One for review by Joe Walker during the summer of 1969 in connection with the defense of the legal proceedings for which this affidavit is prepared.

8. During and in connection with the matter referred to in paragraph 7(c), Choate Hall and Joe Walker gave Austin Olney, a Director of Houghton Mifflin and Sales Manager of the Trade Division of Houghton Mifflin, permission and the opportunity to examine the photostatic copy referred to in paragraph 7(c), but affiant is informed by Austin Olney and believes that Austin Olney does not recall reading or examining any document pertaining to the testimony of Joe Walker before the aforesaid grand jury.

9. Affiant is informed and believes that, except as indicated herein, no copy or original of the said memorandum prepared by Attorney Frank Cicero, Jr., has been disclosed to anyone.

10. Affiant is informed and believes that the contents of said memorandum have not been disclosed to anyone except by or among attorneys in Choate Hall, Kirkland Ellis, and Mayer Friedlich and Joe Walker

Further affiant sayeth not.

/s/ Brinton P. Roberts

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

AFFIDAVIT OF BRINTON P. ROBERTS, ESQ. [RELATING TO FRANCIS H. DYCKMAN JR., HOUGHTON MIFFLIN CO.]

BRINTON P. ROBERTS, being duly sworn, deposes and says as follows:

1. He is an attorney admitted to practice before the Courts of the Commonwealth of Massachusetts, the United

States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit and that he is presently and has, since September 1965, been associated with the law firm of Choate, Hall and Stewart ("Choate Hall").

2. Choate Hall is, and has been since prior to 1966, general legal counsel for Houghton Mifflin Company ("Houghton Mifflin"). As such, Choate Hall in the summer of 1966 was requested by Houghton Mifflin to represent and counsel Houghton Mifflin with respect to subpoenae received by Houghton Mifflin in connection with a grand jury investigation instituted in the Northern District of Illinois and with respect to any and all matters related to or arising out of said investigation. Choate Hall has represented and counselled, and is representing and counselling, Houghton Mifflin in connection with all said matters, including the legal proceedings in which this affidavit is to be filed, and affiant has personal knowledge of said matters.

3. During the summer of 1966 the law firm of Kirkland, Ellis, Hodson, Chaffetz and Masters of Chicago, Illinois ("Kirkland Ellis") was retained to assist Choate Hall in representing and counselling Houghton Mifflin in connection with said grand jury investigation. Houghton Mifflin was billed by Kirkland Ellis for said services and has paid said bill.

4. Affiant is informed and believes that on September 21, 1966 in rendering the legal services requested of Kirkland Ellis, Attorney Frank Cicero, Jr., an associate of Kirkland Ellis, interviewed Francis H. Dyckman, Jr., the Manager of the New York Office of The Trade Division of Houghton Mifflin, following Francis H. Dyckman, Jr's. appearance before the said grand jury, in the offices of Kirkland Ellis, at which interview were present only Joe Walker, Attorney Cicero and perhaps

Attorney Fred H. Bartlit, Jr., a partner in Kirkland Ellis.

5. Affiant is informed and believes that following said interview, Attorney Frank Cicero caused to be prepared five (5) copies of a memorandum setting forth Attorney Frank Cicero's recollection of the interview, of which three (3) copies were retained by Kirkland Ellis and were, following the completion of the services of Kirkland Ellis, destroyed in the normal course of business without being disclosed to anyone other than partners or associates of Kirkland Ellis.

6. Kirkland Ellis caused to be delivered to Choate Hall the other two (2) copies of the said memorandum. Said two (2) copies are in the files of Choate Hall and have not been examined by other than partners or associates of Choate Hall.

7. Three (3) copies of one of the two (2) copies of said memorandum have been made by Choate Hall for the following purposes:

(a) One to be filed as required by the order, dated August 7, 1969, of the Court in which this affidavit is to be filed;

(b) One to be delivered to the law firm of Mayer, Friedlich, Spiess, Tierney, Brown & Platt of Chicago, Illinois ("Mayer Friedlich") presently counsel for Houghton Mifflin in connection with the legal proceedings in which this affidavit is to be filed; and

(c) One for review by Francis H. Dyckman, Jr. during the summer of 1969 in connection with the defense of the legal proceedings for which this affidavit is prepared.

8. Affiant is informed and believes that, except as indicated herein, no copy or original of the said memorandum prepared by Attorney Frank Cicero, Jr. has been disclosed to anyone.

9. Affiant is informed and believes that the contents of said memorandum have not been disclosed to anyone except by or among the attorneys in Choate Hall, Kirkland Ellis, and Mayer Friedlich and Francis H. Dyckman, Jr.

Further affiant sayeth not.

/s/ Brinton P. Roberts

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899)

(And Related Cases)

STATEMENT OF
DEFENDANT CAMPBELL & HALL, INC.
WITH RESPECT TO MEMORANDA
RELATIVE TO GRAND JURY TESTIMONY
[OF ALBERT P. MITCHELL AND RUPERT ANDRUS]

Pursuant to Order of this Court dated August 7, 1969, defendant Campbell & Hall, Inc. has filed herewith in a sealed envelope a memorandum relative to the grand jury testimony of Albert P. Mitchell and a memorandum relative to the grand jury testimony of Rupert Andrus. Mr. Mitchell and Mr. Andrus are employees of Campbell & Hall, Inc. and were such at the time the memoranda were prepared.

The memoranda record the recollection of Messrs. Mitchell and Andrus as to what transpired in the course of their respective interrogations before the grand jury. Each of these memoranda was prepared by David F. Cavers, Jr. of Palmer, Dodge, Gardner &

Bradford, Boston, Massachusetts, and David P. List of Leibman, Williams, Bennett, Baird & Minow, Chicago, Illinois, counsel for Campbell & Hall, Inc. Each of the memoranda was typed by employees of Leibman, Williams, Bennett, Baird & Minow, Mr. List's law firm, and copies of these memoranda were retained in the files of Palmer, Dodge, Gardner & Bradford and Leibman, Williams, Bennett, Baird & Minow, and were not exhibited to or delivered to Campbell & Hall, Inc., or to the respective witnesses.

Dated: August 25, 1969.

/s/ David P. List

IN THE UNITED STATES DISTRICT COURT

(Caption — No. 67 C 1899 and related cases)

STATEMENT OF BAKER & TAYLOR WITH RESPECT TO DOCUMENTS PRODUCED IN RESPONSE TO PARAGRAPH ONE OF PLAINTIFF'S RULE 34 MOTION [RELATING TO ALAN HOOD, JAMES THOMPSON AND BRUCE ANDRESEN]

In accordance with the Court's order of August 7, 1969 concerning production of documents by defendants, Baker & Taylor Co. submits herewith a sealed envelope containing documents responsive to Paragraph 1 of plaintiffs' motion for production of documents. These documents consist of separate memoranda by counsel concerning the testimony of each of Baker & Taylor's employees appearing before the Grand Jury in the proceeding in the Northern District of Illinois docketed as 66 G.J. 2003.

Disclosure of such documents in this litigation would constitute a violation of the attorney-client privilege and would be contrary to the rules concerning the work product of counsel.

The circumstances under which each document was prepared are as follows:

1. Each document was prepared by counsel for possible future use by counsel.

2. Messrs. Sonnenschein Levinson Carline Nath & Rosenthal are counsel to both the individuals and Baker & Taylor in these matters and have acted in that capacity.

3. Each witness met with counsel following his testimony before the Grand Jury. No one else was present at these meetings.

4. In the case of Alan C. Hood, counsel had a discussion with Mr. Hood and counsel then prepared a memorandum summarizing Mr. Hood's recollection of the questions asked and answers given. In all other instances, counsel interviewed the witness on a question and answer basis. In such cases, the witness' statements were recorded on a dictating machine. At frequent intervals, counsel would ask questions of the witness. These would be answered by speaking into the machine. On occasion, the dictation was interrupted for extended discussion with counsel. Subsequent to such discussion the witness would resume dictation and might erase and revise portions of the dictation as a result of the further interrogation by counsel. The dictation belts were then transcribed by a secretary. The transcript was then revised by counsel into memorandum form.

5. The memoranda prepared by counsel were given to the witness for review and correction and return to counsel.

6. Counsel did not show such memoranda to the witness at any subsequent time. Specifically, such memoranda were not shown to witnesses prior to depositions taken in this cause.

Counsel respectfully request that they be given no less than seven days' prior notice of any in camera examination of the contents of the attached envelope or of any ruling with respect to the turnover of such documents to plaintiffs so as to permit them to take appropriate steps in accordance with the privileged character of the documents.

Earl E. Pollock
Alan H. Silberman

UNITED STATES DISTRICT COURT

(Caption—No. 67 C 1899 And Related Cases)

STATEMENT OF DEFENDANT DAVID McKAY COMPANY, INC. CONCERNING A MEMORANDUM RELATING TO THE GRAND JURY TESTIMONY OF WILLIAM HOOCKER

1. This statement concerns a memorandum dated September 19, 1966, prepared by R. Andrew Boose, Esq., an attorney associated with the firm of Greenbaum, Wolff & Ernst, counsel for defendant David McKay Company, Inc. (hereinafter referred to as "the memorandum"); the original of the memorandum was directed to the files of Greenbaum, Wolff & Ernst, and copies of it were sent to two members of that firm. The memorandum relates to the testimony of William Hoocker, an employee of defendant David McKay Company, Inc., before a Federal Grand

Jury in Chicago, Illinois on September 19, 1966. A Xerox copy of the memorandum was filed with the Court under seal on August 21, 1969.

2. Defendant David McKay Company, Inc. objects to disclosure of the memorandum to plaintiffs herein (a) because the confidentiality of the memorandum is protected by the attorney-client privilege, and (b) because the memorandum embodies the work-product of Messrs. Greenbaum, Wolff & Ernst, counsel for defendant David McKay Company, Inc.

3. Mr. Boose prepared the memorandum to record the events which transpired at his October 4, 1966 meeting with Mr. Hoocker and Maurice C. Greenbaum, Esq., a partner in the firm of Greenbaum, Wolff & Ernst; no other person was present at that meeting. That meeting was held to enable Mr. Hoocker to inform Messrs. Greenbaum and Boose (acting as counsel for defendant David McKay Company, Inc.) about the substance of his grand jury testimony, so that Messrs. Greenbaum and Boose (and their firm) could provide appropriate legal advice to defendant David McKay Company, Inc. with respect to certain matters which were then pending.

4. The memorandum records Mr. Boose's recollection of what transpired at that October 4, 1966 meeting, and also records his observations, comments and impressions about Mr. Hoocker's report of his appearance before the grand jury. The memorandum also reflects the manner in which Messrs. Greenbaum and Boose conducted the meeting and questioned Mr. Hoocker, and it thereby reflects their judgment regarding the relative importance of various subjects which were discussed during that meeting. In addition, the arrangement of the memorandum, the particular information which it contains, the emphasis which it places upon certain subjects, and the underlinings

and marginal notations which appear on its face, all reflect Mr. Boose's judgment regarding the significance of the matters which are reported therein.

5. The memorandum has not been shown to, or read by, any individual other than attorneys associated with the firms of Greenbaum, Wolff & Ernst and Mayer, Friedlich, Spiess, Tierney, Brown & Platt (which firms are counsel for defendant David McKay Company, Inc. in New York and Chicago respectively), and those attorneys have reviewed the document only in their role as such counsel. No copy of the memorandum ever was given to David McKay Company, Inc., and neither Mr. Hoecker nor any other individual at David McKay Company, Inc. has seen the memorandum.

/s/ Lee N. Abrams

SUPREME COURT, U. S.
FILED
JUN 18 1970
JOHN F. DAVIS, CLERK

No. 113

In the

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1337

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Appendix, pp. 61a-67a) is reported at 423 F.2d 487. The opinion of the District Court for the Northern District of Illinois (Appendix, pp. 7a-21a) is reported at 1969 CCH Trade Cases ¶72,965.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1970, and amended by order of March 11,

1970. The petition for a writ of certiorari was filed on March 20, 1970. It was granted on May 4, 1970. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).[1]

QUESTIONS PRESENTED

1. Whether a writ of mandamus can properly be used, despite the "final judgment" rule and 28 U.S.C. § 1292(b), to reverse a trial court's discovery order for the production of statements made by grand jury witnesses to defendants' counsel describing the witnesses' testimony before the grand jury?

2. Whether the Court of Appeals for the Seventh Circuit erred in holding that an attorney-corporate client privilege extends to narrative statements solicited by corporate counsel from non-management employees about their grand jury testimony?

STATEMENT OF THE CASE

This petition arises out of pre-trial discovery proceedings in multi-district antitrust litigation consolidated before Judge Bernard M. Decker, United States District Court for the Northern District of Illinois. The representative plaintiffs instituted class actions to recover damages on behalf of public schools, public libraries, and parochial schools that were victims of a charged conspiracy by defendant publishers and wholesalers to inflate the prices of library editions of children's books.[2]

---

[1] The Court of Appeals stayed the issuance of the writ of mandamus until disposition of these proceedings by orders of February 11, 1970, and March 11, 1970 (Appendix, pp. 67a-71a).

[2] The plaintiffs in the treble-damage proceedings here involved are the States of Illinois, Indiana, Texas, West Virginia, Ohio, Wisconsin, Kansas and Minnesota, the City of Chicago, the Archbishop of Cincinnati, the Metro-

For more than a year and a half, plaintiffs have actively pursued discovery, including taking depositions of approximately one hundred witnesses. Faced with a pattern of forgetfulness, recalcitrance, prevarication and evasiveness by the witnesses, plaintiffs moved under Rule 34 for the production of so-called "debriefing" statements, *i.e.*, narrative accounts taken from employees and ex-employees of defendant companies relating to their testimony before a grand jury investigating price-fixing conspiracies in the sale of children's books to public schools and libraries.

Certain defendants opposed such production, interposing the attorney-client privilege and work-product doctrine.[2] The District Court ordered that all relevant documents be produced, but provided:

> "that if any defendant objects to the production of any document . . . on the grounds of 'attorney-client' or 'work product' privilege, such defendant . . . shall file said document in a sealed envelope, accompanied by a precise factual statement setting forth the circumstances under which the document was prepared." Order of August 7, 1969 (Appendix p. 6)

Upon consideration of the affidavits, briefs, arguments of counsel, as well as a review of deposition testimony and an *in camera* inspection of grand jury testimony, the District Court found that the attorneys "did not ren-

---

[2] (Continued)
politan Government of Nashville and Davidson County, and certain school districts in Nassau and Suffolk Counties, New York.

Counsel for several defendants voluntarily turned over "debriefing" statements taken from employees of their corporate clients.

der personal legal advice after the witnesses completed their grand jury testimony," and that "the debriefing consultations were apparently conducted as a favor to the corporations." (Appendix, pp. 15a-16a) Moreover, the district judge made the following findings with respect to deposition testimony of defense witnesses which he reviewed.

> (a) "Each witness demonstrated a remarkable lack of memory concerning critical evidence in controversy" and "what recollection they could muster was often so vague as to be of only limited value." (Appendix, pp. 9a, 13a)
>
> (b) "Some witnesses have been deliberately evasive," "other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence," and the "deposition testimony sometimes conflicts with documentary evidence which the witnesses personally prepared several years ago." (Appendix, pp. 7a-8a)
>
> (c) The recall of each witness was substantially more extensive when he appeared before the grand jury, and "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect." (Appendix, p. 9a)

In this context, the District Court enumerated several factors justifying release of the debriefing statements to aid plaintiffs to establish critical facts and ascertain the truth:

> "The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual

> questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from 'net' prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances." (Appendix, p. 20a)

On the record made by defendants, the District Court concluded that three "debriefing" statements were privileged and would be returned to counsel. With respect to thirty "debriefing" statements, however, the District Court determined that (a) the evidence failed to establish that a confidential attorney-client relationship existed, and (b) plaintiffs had shown "good cause" and "special circumstances" for discovery which outweighed the qualified protection afforded work product, even assuming that simple witness narratives could be called work product.

The District Court held that the attorney-corporate client privilege attaches when a responsible member of the corporate management seeks or receives legal advice on behalf of the corporation. In this regard, the District Court found that only two witnesses "were in a position to influence their company's litigation strategy in these lawsuits. While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was

sought—the company's litigation response to the price fixing cases. Accordingly, the debriefing documents [with two exceptions] are not protected by a corporate attorney-client privilege." (Appendix, p. 17a)

The defendants sought to have the matter certified for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court, following the holding in *Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964), denied certification on the ground that such a piecemeal appeal would not facilitate the final disposition of the case.[4]

Upon a petition by defendants, the Court of Appeals granted in part and denied in part a writ of mandamus. The Court of Appeals refused to disturb the District Court's findings that no attorney-personal client privilege existed between the corporate counsel and the witnesses interviewed and that "good cause" had been shown for discovery of the work product of defense attorneys. With respect to the issue of attorney-corporate client privilege, the Court of Appeals acknowledged that the District Court had properly applied the law enunciated in previous federal decisions:

> "The district judge substantially followed the 'control group' test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962), 210 F.Supp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary

[4] Transcript of Proceedings, October 17, 1969, pp. 39-40.

Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.

> Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th Cir., 1969), 392 F.2d 686, 692; *Garrison* v. *General Motors Corp.* (S.D. Cal., 1963), 213 F.Supp. 515." (423 F.2d at 491.)

The opinion further conceded:

> "If the control group test be wholly adequate it has not been shown that the district judge erred in his application of it." (423 F.2d at 491)

However, the Court of Appeals concluded that "the control group test is not wholly adequate" and that:

> "because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (423 F.2d at 492)

Without further effort to justify the use of mandamus, the Seventh Circuit ruled that the District Court's "order is unlawful" and that "a writ of mandamus will issue compelling respondent district judge to exempt from" his discovery order debriefing statements taken from individuals who were corporate employees at the time of the statement, and "to order the return of each of those debriefing statements to the defendants which produced it." (423 F.2d at 491, 492)

The Seventh Circuit did not disturb the District Court's determination that no attorney-corporate client privilege encompassed debriefing statements which corporate counsel gathered from former employees and employees of other companies. By order of March 11, 1970, the

Court of Appeals adhered to this decision, denying a claim of privilege by certain defendants for debriefing statements which they obtained from employees of another company that had acted as their joint sales agent. (423 F.2d at 493)

The issue that remains for resolution by this Court is whether the debriefing statements taken from non-control group employees should be entitled to the protection of an attorney-corporate client privilege.

SUMMARY OF ARGUMENT

I.

The circumstances of this case provide no justification for the issuance of a writ of mandamus by the Court of Appeals for the Seventh Circuit. The District Court not only acted within its jurisdiction and authority, but properly applied the relevant federal decisions, in ordering the production of debriefing statements taken from grand jury witnesses by corporate defense counsel. Disagreement by the Court of Appeals with the well-established legal principles which the District Court followed affords no basis to review, much less disturb, the discovery order entered by the district judge. The use of the extraordinary remedy of mandamus to reverse the ruling by the District Court violates the admonitions of this Court and the federal policy against "piecemeal" appeals embodied in 28 U.S.C. § 1292(b).

The defendants did not cross-petition from that portion of the Seventh Circuit's opinion which denied mandamus with respect to the District Court's discovery rulings.

II.

The debriefing statements ordered produced consisted of narrations by witnesses of what transpired before the grand jury. On the basis of an analysis of the factual circumstances under which these debriefing sessions were conducted, the District Court concluded that the narrative statements did not involve confidential communications from a client for the purpose of securing legal advice from its professional legal advisor. The District Court properly held that such an attorney-corporate client privileged relationship could only exist if the communication were made to an attorney by corporate personnel having authority to control or substantially participate in a corporate decision regarding action to be taken on advice of the attorney.

Only the "control group" of the corporation may be considered the corporate client in the claimed attorney-corporate client privileged relationship. By this means a proper balance is struck between the need to secure access to the facts and the interest allegedly furthered by the privilege. Extension of an attorney-corporate client privilege beyond the control group would conceal the truth and serve no legitimate purpose, as demonstrated by the facts of this case.

ARGUMENT

I. THE SEVENTH CIRCUIT IMPROPERLY USED THE WRIT OF MANDAMUS TO REVERSE THE DISTRICT COURT'S ORDER FOR THE PRODUCTION OF DOCUMENTS.

This Court has consistently held that mandamus will not lie to review a discovery order unless the aggrieved party shows a clear abuse of discretion and establishes an indisputable right to such drastic relief. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

The reasoning of the Seventh Circuit's opinion itself reveals the lack of justification for issuing a writ of mandamus in this case. The District Court had unquestioned power to direct production of the "debriefing" statements under Rule 34 of the Federal Rules of Civil Procedure. The challenged discovery order rested upon legal principles that had been developed in an uncontradicted line of federal cases.[*] The District Court framed its ruling in reliance, *inter alia*, upon the decision in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962) (Kirkpatrick, J.), which articulated the control group test with respect to whether statements taken from employees were protected by the attorney-corporate client privilege. The defendants aggrieved by the discovery ruling in *City of Philadelphia* v. *Westinghouse Electric Co.* unsuccessfully petitioned the Third Circuit for a writ of mandamus. *General Electric*

[*] See Comment to Rule 5-03, Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, pp. 80-81 (March 1969).

Co. v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). The reaffirmance of the control group test by many decisions since Judge Kirkpatrick's 1962 opinion makes mandamus even less appropriate now than when the attorney-corporate client privilege issue confronted the Third Circuit.

Indeed, the Court of Appeals conceded that the district judge properly applied the law embodied in several recent decisions at the trial and appellate level. *E.g.*, *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963).[7] Another panel of the Seventh Circuit had previously indicated acceptance of a standard similar to the control group test by its ruling in *Rucker* v. *Wabash Railroad Co.*, 418 F.2d 146, 154 (7th Cir. 1969):

> "Neither party may successfully assert the attorney-client privilege as to the statements of non-party witnesses. Hickman v. Taylor, 329 U.S. 495, 507. . . . This is true of defendant's statements given by its servants and agents in this case. None were of such rank as to qualify as representative of the corporate client."

The acknowledgment that the District Court "substantially followed" all relevant federal law vitiates any basis to review, much less disturb, its production order by the extraordinary remedy of mandamus.

On numerous occasions this Court has stressed that "only exceptional circumstances amounting to a judicial usurpation of power will justify invocation" of the ex-

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[7] Moreover, precedent in addition to the cases cited by the Seventh Circuit supports the District Court's ruling. *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D.N.Y., Dec. 4, 1962) (Ryan, Christensen, JJ.).

traordinary remedy of mandamus to overturn a district court discovery ruling. *Will* v. *United States*, 389 U.S. 90, 95 (1967). The *Will* opinion further states:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of non-appealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" (389 U.S. at 98, n. 6)

This rule and policy against employment of mandamus to review an allegedly erroneous ruling within the jurisdiction of the district court applies with equal force in civil litigation as in criminal cases. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383 (1953) (a civil antitrust case).

The power to grant the peremptory writ of mandamus must be "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). A writ of mandamus is a singularly inappropriate remedy with respect to discovery orders entrusted to the discretion of the trial judge in complex antitrust cases where interlocutory review may be sought for delay or harassment. *Cf. Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964); *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir.), *stay denied*, 83 S.Ct. 964 (1963) (Harlan, J.). Indeed, in the course of these consolidated pretrial proceedings, defendants have twice petitioned for a writ of mandamus to challenge discovery orders. See *Harper & Row Publishers, Inc.* v. *Decker*, 394 U.S. 944 (1969).

For these reasons, this Court has enforced the Congressional prohibition against "piecemeal" appellate review. *E.g., Switzerland Cheese Ass'n.* v. *E. Horne's Market*, 385 U.S. 23, 24 (1966). The opinion in *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) stresses the rationale underlying this policy:

> "Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

The defendants advanced no basis to invoke the extraordinary remedy of mandamus. The District Court applied well-established and sound legal principles to the particular facts of this case in ruling that the evidence failed to establish that the debriefing statements were collected in the course of a confidential attorney-corporate client relationship.

The office of mandamus cannot be used to control the decisions of district courts, but only to confine lower courts to their prescribed jurisdiction. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *Ex parte Peru*, 318 U.S. 578, 583 (1943). The bounds of the discretionary power to issue such writs are set forth in *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956) (Harlan, J.):

> "The power to issue them is discretionary and it is sparingly exercised. . . . This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland* v. *Soper*, 270 U.S. 9, 29-30. Here the most that could be claimed is that the district courts have erred in ruling on

matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals."

The Seventh Circuit's opinion explains the use of mandamus on the grounds that "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice" and "an appeal after disclosure of the privileged communication is an inadequate remedy." These assertions offer no valid reason for interlocutory review of the District Court's discovery order by mandamus.

The record contains no evidence to support the assumption that disclosure of these debriefing statements, even if erroneous, would cause any injury that could not be remedied in the normal course of appellate review. The factual affidavits filed by defendants make no claim that production of the debriefing statements would reveal trial strategy, or that any of the debriefing statements contain irrelevant, personal, or otherwise confidential material. As Judge Decker specifically found: "The debriefing statements are essentially factual summaries of the witnesses' testimony" before the grand jury. (Appendix, p. 14a) The defendants will be "injured" by disclosure of such debriefing statements only if their employees have been dishonest or disingenuous during depositions. The extraordinary writ of mandamus was not meant to remedy this kind of injury.

The argument that an alleged error cannot be rectified after disclosure of confidential information applies to all discovery orders. This case is indistinguishable from any other instance in which a lower court orders production of material claimed to be privileged. By using man-

damus to protect against the alleged harm that may result from disclosure of the debriefing statements, the Seventh Circuit's decision invites interlocutory review of all rulings on assertions of an evidentiary privilege. This is not the function that mandamus was intended to serve.

Nor does it matter that a litigant may experience the hardship and inconvenience of a trial before the issue is resolved in the appellate court. The writ of mandamus still may not be used as a substitute for appeal. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *United States Alkali Export Ass'n.* v. *United States*, 325 U.S. 196, 202-203 (1945).

The fact that the Court of Appeals thought that the District Court's ruling involved a question of "substantial importance" provides no ground to circumvent the ordinary process of judicial review. The appellate jurisdiction of the federal courts must be exercised under statutory authority conferred by Congress. *Chandler* v. *Judicial Council of the Tenth Circuit*, 38 *U.S. Law Week*, 4413, 4424 (1970) (concurring opinion of Harlan, J.). The discretion to review interlocutory decisions may be exercised only in the circumstances defined by 28 U.S.C. §1292. These conditions were not satisfied in the present proceeding.

II. THE ATTORNEY-CORPORATE CLIENT PRIVILEGE DOES NOT EXTEND TO NARRATIVE STATEMENTS OBTAINED BY CORPORATE COUNSEL FROM NON-MANAGEMENT EMPLOYEES ABOUT THEIR GRAND JURY TESTIMONY

The District Court followed an uncontradicted line of federal authority in holding that an attorney-corporate client privilege did not arise from the debriefing sessions

at which corporate counsel interviewed grand jury witnesses.[8] While the district judge recognized the immunity afforded by the attorney-corporate client privilege, he ruled that:

> "[O]nly communications from certain employees to the company's attorney create that relationship. Specifically, a responsible member of the corporation's management or control group must seek legal advice about corporate affairs. [citation] Moreover, the corporate official must be in a position to influence the decision about which legal counsel is sought." (Appendix, p. 16a)

The Court of Appeals for the Seventh Circuit issued a writ of mandamus to reverse this ruling. It held that the District Court acted unlawfully in finding that the defendants had offered insufficient support for their claims of attorney-corporate client privilege under the applicable legal principles.

An evaluation of the appropriate limits to be placed on the attorney-corporate client privilege and the correctness of the decisions under review requires initial discussion of the type of material which defendants have sought to cloak with the privilege and the circumstances under which these documents were prepared.

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[8] The defendants below claimed the attorney-corporate client privilege for statements taken from witnesses without regard to whether they were employed by the company that counsel represented. In this proceeding, the defendants assert an attorney-corporate client privilege only with respect to employees.

A. THE DISTRICT COURT CORRECTLY HELD THAT THE CIRCUMSTANCES DESCRIBED BY DEFENDANTS DID NOT CREATE AN ATTORNEY-CLIENT PRIVILEGE

The District Court's discovery order rested upon a finding that the necessary factual indicia of an attorney-client relationship were lacking with respect to the narrative statements given to corporate counsel by the grand jury witnesses. On the basis of the "precise factual statement[s]" submitted by defense counsel, as well as deposition testimony, the district judge determined that these simple witness narratives reflected no confidential communications made in the course of an attorney-client relationship.[9]

During the investigation conducted by the federal grand jury into price-fixing in the sale of children's books to public schools and libraries, attorneys for the defendant companies interviewed the various witnesses following their appearance before the grand jury. These interviews were conducted for the avowed purpose of learning from the witness "the substance of his grand jury testimony." [10] "The memoranda record the recollection of [the witnesses] as to what transpired in the course of their re-

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[9] In their affidavits and factual statements, defendants often claimed that the witnesses interviewed were personal as well as corporate clients. The defendants specifically asserted that many of the debriefing statements involved in this proceeding were protected by an attorney-personal client privilege, *i.e.*, the statements taken from witnesses Patella, Guerney, Scioscia, Heidelberger, Stokes, Davidson, Callaway, Hood, Thompson, Moorman, Andresen, and Golden Press "A". These claims of attorney-personal client privilege were rejected and have now been abandoned.

[10] Factual statement with respect to witness Hoocker (Appendix, p. 99a).

spective interrogations before the grand jury."[11] The defense counsel sought to discover what areas of inquiry were being pursued by the federal investigators and what other witnesses had appeared or were scheduled to appear. By having the witness recount the questions asked before the grand jury, the attorneys were able to piece together the evidence which had already been assembled from other sources and presented to the grand jury. In addition, the defendants learned whether other companies had given the grand jury incriminating correspondence which defendants had not retained in their corporate files or which they had construed as not requested by the federal subpoena. Defense counsel attempted to find out not only what each witness informed the grand jury, but also matters connected with the price-fixing conspiracy which the witnesses may not have told the grand jury.

The circumstances of the various debriefing interviews differed slightly. Some witnesses were interrogated by several attorneys, representing their current and past employers. Counsel sometimes jointly conducted these interviews.[12] One attorney interviewed witnesses from four different companies that his firm represented, as well as witnesses from other companies.[13] The recollec-

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[11] Factual statement with respect to witnesses Mitchell and Andrus (Appendix, p. 95a).

[12] Factual statements with respect to Golden Press witnesses "B" (Andresen) and "D" (Roland) (Appendix, pp. 80a-85a).

[13] Factual statements with respect to witnesses Davidson and Patella (Grosset & Dunlap), Guerney and Scioscia (Harper & Row), Stokes (Scribner's), and Heidelberger (E. P. Dutton) (Appendix, pp. 71a-80a). The same attorney also interviewed Mathiesen (E. M. Hale). See Seventh Circuit's order of March 11, 1970 (Appendix, pp. 69a-70a).

tions of witnesses were recorded in several ways—by the witnesses themselves,[14] by dictaphone machines,[15] and by counsel or their secretaries.

The debriefing statements were taken to enable the defendant companies to chart the direction of the federal investigation and to instruct other witnesses who might be called to testify. By the exchange of information gathered from debriefing interviews, defense counsel could advise witnesses of the matters which had come to light and the shoals to avoid.[16] Several years following the conclusion of the grand jury proceedings, some defendants used the debriefing statements to prepare their witnesses for depositions by the treble-damage plaintiffs.[17]

The general criteria for existence of the attorney-client privilege have been phrased in the following form:

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance perma-

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[14] Factual statement with respect to witness Callaway (Appendix, pp. 87a-89a).

[15] Factual statements with respect to witnesses Thompson and Andresen (Appendix, p. 97a), and Golden Press "B" (Appendix, p. 83a).

[16] None of the affidavits or statements submitted by counsel assert that the information contained in the debriefing statements, or the substance of such statements, was kept within the corporation.

[17] Factual statements with respect to witnesses Walker and Dyckman (Appendix, pp. 92a, 94a).

Under generally accepted principles, any material used to refresh the recollection of a witness, even if assertedly privileged, must be made available for use in cross-examination. *National Dairy Products Corp.* v. *United States*, 384 F.2d 457 (8th Cir. 1967), *cert. denied*, 390 U.S. 957 (1968).

nently protected from disclosure by himself or by the legal adviser, except the protection be waived." 8 Wigmore, *Evidence*, §2292 (3d ed. 1940)

Applying the above principles, the District Court determined that the debriefing statements, with two exceptions, were not communications protected by the attorney-client privilege, finding that the grand jury witnesses neither sought nor received legal advice relating to corporate affairs during their debriefing interviews. The record fully supports this determination. The defendants submitted no proof showing that a confidential attorney-client relationship existed when the debriefing interviews were conducted. None of the affidavits stated that the witness interviewed had sought or received legal advice following his grand jury appearance. None of the affidavits stated or even indicated that the witness expected or requested that his disclosure be kept confidential.[18]

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[18] It is likely that defendants purposely confined their affidavits to conclusory assertions. For when counsel ventured to be more specific, they were flatly contradicted by deposition testimony from available witnesses. For instance, counsel for Harper & Row asserted in memorandum form that the debriefing statements were "confidential communications", and that "Messrs. Davidson . . . and Rose sought the advice of that firm and were its clients." But Davidson testified that he was interviewed about his grand jury testimony at the request of counsel for his corporate employer and that it made no difference to him whether his statement was kept confidential. (Davidson Deposition Tr. 13, 17) The testimony of Rose further refutes these false assertions:

> "Q. After you testified before the Grand Jury, did you tell anyone about what you told the Grand Jury?
>
> A. Yes. . . . I simply called Bill Ashworth [sales manager of Harper & Row] to tell him I had been out there, and he asked me if I would have any objection to speaking with *their lawyer*. I said 'No.'" (Rose Deposition Tr. 27)

The debriefing statements simply recorded interviews by corporate counsel with assorted salesmen and sales managers in order to summarize the recollections of these witnesses as to their grand jury testimony.[12] The testimony of Leslie Rowe exemplifies the nature of the debriefing interviews, and the fact that the witnesses were not involved in the litigation for which the narrative statements were collected. Rowe related that he was questioned about his grand jury testimony on separate occasions by counsel for G. P. Putnam's Sons (his former employer), and Thomas Y. Crowell Co. (his current employer). He attended these interviews at the request of the corporate attorneys, not to secure legal advice or discuss the position his company should take in the litigation. Rowe did not request or understand that his narrative would be kept confidential. (Rowe Deposition, Tr. 23-31)

Based on the factual record made by the defense counsel and witnesses, the District Court rejected all but two claims of attorney-corporate client privilege, holding that a attorney-corporate client privilege only attaches when a responsible or appropriate member of the corporate management seeks or receives legal advice on behalf of the corporation. This has been described as the "control group test."

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[12] In these endeavors, the attorneys acted as little more than scriveners. *Cf. Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D.N.Y. 1951) (Weinfeld, J.)

B. THE CONTROL GROUP TEST PROPERLY DEFINES THE SCOPE OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE

The federal courts have given limited application to the attorney-corporate client privilege,[20] heeding the admonition quoted in *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963):

> "Nevertheless, the [attorney-corporate client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."

It is clear that the granting of a privilege to conceal relevant information from scrutiny of a judicial proceeding carries a heavy burden of justification. The person or group asserting the privilege must establish the right of concealment. As stated by Professor Wigmore, four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:[21]

> "(1) The communications must originate in a *confidence* that they will not be disclosed.
>
> "(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> "(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered;* and

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[20] This Court has never determined that an attorney-corporate client privilege actually exists.

"(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

8 Wigmore, *Evidence* § 2285 (3d ed., 1940)

The debriefing statements taken by corporate counsel from non-management employees do not satisfy these prerequisites.

The control group test which the District Court applied has been developed by the federal decisions to delineate what communications qualify for the attorney-client privilege in the corporate context or, in other words, who should be considered as the "client." Since privilege is invoked solely on behalf of the corporate client, its protection has been held to extend only to confidential communications between the corporate attorney and corporate personnel having "the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or [an individual who] is an authorized member of a group that has such power." *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

The decision in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962, Kirkpatrick, J.), sets forth the rationale for the control group test:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body

> or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."[21]

This doctrine derives from the decision in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947), that "the protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation."[22]

The control group test has been followed by a number of other federal courts. *E.g., Honeywell, Inc.* v. *Piper Aircraft Corp.*, 1970 CCH Trade Cases ¶ 73,122 (M.D. Pa. 1970); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963); *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D.N.Y., December 4, 1962) (attorney-corporate client privilege held not to protect "a stenographically reported statement which had been given

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[21] Subsequent to his enunciation of the control group test, Judge Kirkpatrick ruled that production of a debriefing statement was "not forbidden by the attorney-client privilege." *City of Philadelphia* v. *Westinghouse Electric Corp.*, 32 F.R.D. 350, 351 (E.D. Pa. 1962). Judge Kirkpatrick had already rejected a claim of privilege by defendant "with respect to the information acquired by its general counsel, Mr. Wood, in the course of his investigation of facts relevant to the impending indictment of the company." *City of Philadelphia* v. *Westinghouse Electric Corp.*, (Memorandum Opinion dated July 19, 1962).

[22] The attorney in *Hickman* v. *Taylor* represented the owner of the tugboat involved in a fatal crash, and the witnesses interviewed were crew members who had survived.

by the witness to counsel for his employer, C. H. Wheeler Company, in the presence of the president of the company, concerning the testimony theretofore given by the witness to the Grand Jury").[23]

The District Court applied the control group test in determining what persons were encompassed within the definition of "client" for purposes of the privilege. The debriefing statements taken from James Milne, a sales manager, and George Bonsall, an executive vice-president, were held protected by the privilege and returned to the corporate defendants. These were the only two instances in which the defendants claimed that the employee interviewed had any connection with the formulation of corporate policy in response to the government investigation and potential lawsuits.

The control group test strikes an appropriate balance between the interests sought to be protected by the attorney-corporate client privilege and the legitimate need of litigants to secure access to the facts. The circumstances under which the debriefing statements were collected precludes any assertion that the attorney-corporate client privilege is necessary to encourage full disclosure of

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[23] Acknowledging this "trend" of cases, the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates embodies the control group test, setting forth the general rule of privilege as follows:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communicatons (1) between himself or his representatives and his lawyer or his lawyer's representatives." (Rule 5-03(b))

It defines a "representative of the client" as:

> "One having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." (Rule 5-03(a)(3))

facts by the witness to the corporate attorney. The interviews were not conducted in a confidential atmosphere. The employees simply recounted their experiences before the grand jury at the request of the corporate attorneys, just as they would report to any corporate officer. The statements were not elicited by an expectation of a confidential relationship between the employees and the attorneys representing their companies. In fact, defendants admitted that debriefing statements taken from certain witnesses were circulated or made available to officers of their respective companies.[24] Moreover, the defendants have asserted that the attorney-corporate client privilege should not be waived and confidentiality not broken even by circulation of the debriefing statements among other companies who might become co-defendants or named co-conspirators in subsequent litigation.

The holding that no privilege attaches to reports from non-management personnel to corporate attorneys would have no adverse effect upon the ability of corporations to secure necessary information from these employees. The only conceivable barrier to the witness being candid might arise from a fear of discipline if the employee had violated the law unbeknownst to the corporation or incriminated the corporation (and others) by his admissions to the grand jury. *Cf. United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959). But the attorney-corporate client privilege offers no protection against such contingencies, since the privilege belongs to the corporation, not the individual.[25]

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[24] Factual statements with respect to witnesses Callaway (Appendix, p. 89a) and Walker (Appendix, p. 92a).

[25] *E.g.*, factual statement of Golden Press (Appendix, pp. 85a-86a).

Nor may it be seriously contended that interviews with employees would not be held if later disclosure of statements to damage plaintiffs were a possibility. Every time a corporation amasses information about itself—sales figures, cost studies, travel records, executive diaries—it creates discoverable material that may be valuable in price-fixing cases or other litigation against the company.[20] But corporations do not cease keeping records, or collecting facts, simply because they may have evidentiary significance in lawsuits.

In this regard, it must be noted that the records of interviews conducted by corporate attorneys in preparation for litigation are protected to the extent that such documents embody the work product of the attorneys. *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Discovery of work product may not be secured except upon a showing of "particularized need" or special circumstances. This provides adequate, but flexible, protection for the memoranda of attorneys.

In this case, the corporate attorneys interviewed certain witnesses to ascertain the nature of the grand jury investigation so that they could advise their companies, construct their defense, and prepare exculpatory testimony and documents. But the need to gather information from employees for the purpose of giving legal advice to the corporate client does not itself establish an attorney-corporate client relationship between the attorney and the employee interviewed, no more than it would create such a relationship between the attorney and any other

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[20] A corporation has no privilege against self-incrimination. *Hale* v. *Henkel*, 201 U.S. 43, 73 (1906); *Wilson* v. *United States*, 221 U.S. 361 (1911).

witness who may possess facts essential to the preparation of a case.

The Court of Appeals made the existence of a privilege turn upon whether the employee narrated his recollections to the corporate attorney "at the direction of his superiors in the corporation." 423 F.2d at 491. But in this case, the grand jury witnesses were not agents of the company for the purpose of seeking legal advice. The fact that the corporation may have directed these non-management employees to report certain facts to a corporate attorney does not vest those employees with the necessary authority to create a confidential attorney-client relationship. See *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515, 518 (S.D. Cal. 1963).

The Seventh Circuit's opinion suggests different rules for reports from employees who are bystander witnesses and communications from employees relating to the performance of his employment duties. But this distinction between "witnesses" and "participants" directly conflicts with the holding in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947). Moreover, it creates a wholly unworkable means to determine the proper limits of the attorney-client privilege. The distinction between the employee as participant and witness is particularly inappropriate in anti-trust conspiracy cases, where a mere wink or nod may be sufficient evidence of intent to join in a collusive scheme.[27]

The affidavits and descriptions filed with the District Court by defense counsel reveal that the debriefing inter-

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[27] See, *e.g.*, *Esco Corp.* v. *United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). If the corporate sales manager, for instance, tells the company's lawyer that he told the grand jury (or avoided telling the grand jury) that he attended a meeting where competitors agreed on prices, the sales manager must properly be characterized as a witness.

views were mainly intended to learn what transpired before the grand jury. In this situation, the employee was merely a witness to the questions and answers that occurred in the grand jury room. The giving of testimony to the grand jury constituted no part of the employee's duties to the corporation. Accordingly, the debriefing statements would not be entitled to protection even under the Seventh Circuit's view.

In addition, a number of grand jury witnesses were employed by several different companies during the price-fixing conspiracy. The attorney-client privilege certainly should not protect what these witnesses told the lawyer for their current employer about testimony concerning their sales practices at other companies.

The debriefing statements involved in this case concern the recollection of witnesses with respect to testimony concerning instances of reprisals by publishers against price-cutting wholesalers, reports about violations of the net-price system, exchange of information among co-conspirators, and the maintenance of the price-fixing scheme by other companies involved (as well as their own employers). The Seventh Circuit's opinion provides no rationale for affording protection to such materials.

C. EXTENSION OF THE ATTORNEY-CORPORATE CLIENT PRIVILEGE WOULD IRREVOCABLY CONCEAL THE TRUTH AND SERVE NO LEGITIMATE INTEREST

The attorney-corporate client privilege constitutes an imposing barrier to the ascertainment of facts through discovery procedures. Securing facts through corporate witnesses is a difficult task in itself, especially where

much time elapses between the event and the examination of witnesses at depositions or trial. Established programs within the corporation for the periodic destruction of papers eliminate one source of evidence. Without the possibility of being impeached by written correspondence, memoranda or other documents, witnesses can safely retreat behind a lack of recollection.

These problems are heightened in antitrust damage actions. Due to the inevitable time lapse between a price-fixing conspiracy and the damage trial, access to earlier recorded recollection, such as the debriefing statements in this case, is crucial to effective discovery. Because of the self-concealing nature of the conspiratorial acts, the victims generally do not learn of them until the federal government, equipped with superior means of investigation, has brought charges. For both legal and practical reasons, private damage actions usually do not progress to the discovery stage until the government action is completed or settled. Thus, the discovery aspect of private damage litigation may not occur until three to five years after the conspiracy has been unmasked, and even more years after the crucial events and conversations that were the inception of the illegal scheme. If, as frequently occurs, the federal action is settled by a *nolo contendere* plea or consent judgment, damage plaintiffs must themselves prove the violation.[28] In that effort, the great obstacle is the failing memories of conspirators—real or feigned.

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[28] This case is such a situation. Moreover, the states, cities, and public agencies involved in these damage actions were denied intervention in the federal proceedings which led to the entry of a consent decree. *See City of New York v. United States*, 390 U.S. 715 (1968).

It has been frequently stressed by this Court "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951). Without materials to refresh recollections or reveal that stories have altered over time, recovery for damages as a result of illegal price-fixing may be frustrated by well-rehearsed, false and evasive testimony.

The District Court's findings of particularized need for release of the debriefing statements in this case express strong policy reasons against extension of the attorney-corporate client privilege. Speaking of the deposition testimony given by defense witnesses, the District Court concluded that "each witness demonstrated a remarkable lack of memory concerning crucial evidence in controversy," that "what recollection they could muster was often so vague as to be of only limited value," and that "some witnesses have been deliberately evasive" and recalcitrant. Comparing the deposition testimony with grand jury testimony given more than three years earlier, the District Court found that the recall of each witness was substantially more extensive when he appeared before the grand jury, and "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect."[29]

[29] The District Court made similar findings of fact with respect to the discrepancies between deposition and grand jury testimony of additional witnesses by order and memorandum opinion entered on January 16, 1970: "Particularly prevalent in the deposition testimony is the evasiveness of these witnesses when asked questions central to the issues in this litigation, *e.g.*, the alleged price

Since the debriefing interviews were conducted more than three years prior to the depositions in these treble-damage actions, and concern aspects of the illegal price-fixing conspiracy charged in the complaints, the debriefing statements are invaluable to plaintiffs as clues to whether a deponent has been mistaken, evasive or dishonest. The District Court concluded that the debriefing statements should be released to plaintiffs for the purpose of refreshing the recollections of witnesses and impeaching deposition testimony.

Moreover, the debriefing statements disclose relevant aspects of the price-fixing conspiracy not fully probed by the grand jury and lead to other relevant evidence. As the District Court noted, "a witness may have specified that there were no questions concerning various enumerated incidents of dubious legality." (Appendix, p. 15a, n. 12) One example in this respect is a debriefing statement taken from Si Goldman, an ex-employee of defendant Macmillan Company, which reads:

> "Mr. Goldman related that the Grand Jury had been especially interested in sales manager meetings held monthly in New York beginning roughly in 1961 and continuing until early 1965. The Grand Jury seemed to suspect that these meetings were the occasion for price fixing among publishers and concerted action against discounters. Mr. Goldman was able to testify only as to his inability to recall any discussion on his part of net prices at these meetings, although he conceded to us that others had discussed

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[28] (Continued)

fixing and conspiratorial activities. This evasiveness is all the more notable when contrasted with the witnesses' demonstrated ability to recall events and facts equally remote in time, but with only a peripheral relationship to the allegations of the complaint." (p. 5)

net prices in general although not comparatively between publishers." [30]

A reference in another debriefing statement taken from Goldman throws additional light upon the discussions which occurred among publishers at the "sales managers meetings" with respect to enforcement of the net-price system:

> "Goldman was asked from whom he received information concerning Sapsis' [a book wholesaler] price cutting. Goldman testified that he heard about this from Carl Leibel [another book wholesaler]. . . .
>
> "Goldman said to Leibel that he would look into the matter when he saw Sapsis. He told us that he did this to please the customer. (Goldman really wanted to warn Sapsis about comments he had heard by people other than Macmillan people at a sales manager luncheon. These non-Macmillan people said that they would cut Sapsis off.)" [31]

In addition, other debriefing statements obtained by plaintiffs show that witnesses concealed valuable information in both grand jury and deposition testimony. For example, the debriefing statements taken from Clarence N. Roland, who was sales representative or manager at different times for three defendants—Childrens Press, Golden Press and Follett—sharply contradict his deposition testimony and reveal that the witness had deliberately

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[30] Debriefing statement taken from Si Goldman by attorneys for Macmillan, July 7, 1966 (Goldman Deposition Exhibit 9).

[31] Debriefing statement taken from Si Goldman by attorneys for Macmillan, November 30, 1966 (Goldman Deposition Exhibit 10).

withheld information from the grand jury itself.[32] The following statement recorded by an attorney for Childrens Press is illustrative:

> "Roland told the debriefers but not the grand jury that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5)

The expression "purposely 'lose' orders from discounting jobbers" described a means used by publisher defendants to coerce jobbers into maintaining the fixed net prices as charged in the complaints.

The tape recorded debriefing statement taken at the same interview by Golden Press exposes Roland's evasive testimony before the grand jury concerning enforcement of the net-price system upon wholesalers. This may be seen from Roland's description of the questions posed and his responses:

> "Do you know of any instances where you have done so [lost orders of discounting wholesalers]? And I paused and in my pause he took another question up so I didn't answer it because I was about to answer Yes."
>
> * * *
>
> "Do you know of any instances where Wally Black actually threatened to cut off anyone? About the time I was about to answer, the Court steno stopped for something and this broke his line of questioning."[33]

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[32] Pursuant to Judge Decker's order of October 17, 1969, Childrens Press turned over its Roland debriefing statement to plaintiffs. This debriefing statement was marked as Roland Deposition Exhibit 2.

[33] Debriefing statement taken from C. R. "Larry" Roland by Golden Press, August 31, 1966, pp. 3, 4 (Roland Deposition Exhibit 1).

Prior to Roland's grand jury appearance, three or four defense counsel reviewed with him the evidence that had already been uncovered by the grand jury (and apparently secured by defendants from debriefing sessions with other witnesses), and Roland's own knowledge about the establishment of the prices fixed by publishers for sales of children's books to schools and libraries. The comments of counsel and the witness which were tape recorded during the debriefing session subsequent to Roland's grand jury appearance indicate the attitude of the witness and the nature of his grand jury testimony in this sensitive area:

> "Now, yesterday you told us [the lawyers] about some specific instances . . . . What did you tell him [the examiner] about, in specifics that you can remember? As I told you yesterday I intended to stay away from any specifics unless he crowded, and he didn't crowd."
>
> "I said as far as I know, Runyan [a discounting wholesaler] fell in line. 'Fell in line,' you said? No. I didn't, I'm using it for you. Well I think the phrase I used to him was Bob 'went along with it' because it was to his advantage to do so as he was getting a piece of the business.
>
> Each time you talked about conversations with jobbers and to the best of your knowledge did you insist that it was to the advantage of the wholesaler to do it? Yes."[24]

It has never been demonstrated, however often asserted, that the benefits to be derived from hobbling the judicial process by the doctrine of privileged attorney-corporate client communications exist, no less that they are superior to the benefits of full disclosure that is the

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[24] Debriefing statement taken from C. R. "Larry" Roland by Golden Press, August 31, 1966, pp. 6-7, 14 (Roland Deposition Exhibit 1).

principle upon which the entire judicial process depends. No answer has ever been documented to Professor Morgan's challenge:

> "Whether the client be a plaintiff or a defendant or a mere witness, he is subject to compulsory process and may be required to disclose at the trial or hearing every pertinent fact within his knowledge, under the sanction of an oath or its equivalent that obliges him to tell the whole truth. If he told his lawyer the truth, he must now tell the same thing from the witness box. If he told his lawyer a lie and sticks to it, he will tell the same story at the trial or hearing. If he told his lawyer the truth and now tells a lie, why should he be protected from exposure? Is the privilege retained in order to protect perjurers? How can that either directly or indirectly further the administration of justice?[35]

The defendants have invoked the attorney-corporate client privilege in this case to suppress factual admissions contained in the debriefing statements. There can be no justification in permitting the defendants to keep this material secret and foreclose plaintiffs from this access to the truth. The debriefing statements are not the product of a confidential or other type of relationship which society should foster. Moreover, the debriefing interviews constitute a serious invasion of the grand jury secrecy and proceedings.

In essence, the witnesses were questioned about what occurred before the grand jury so that corporate defense counsel could parry and deflect the federal investigation. The work product doctrine adequately protects whatever interest may be asserted on behalf of this practice.

---

[35] Morgan, Foreword to *Model Code of Evidence*, 26-27. (A.L.I. 1942)

In the proceedings below, the defendants sought to conceal the absence of any factual basis for their claims of attorney-corporate client privilege behind extended and hypothetical policy discussions. The short answer is that the control group test does not interfere with the ability of corporate attorneys to give legal advice to the corporation and its proper representatives in confidence. The corporation, through its management or effective control group, may consult counsel without fear of future disclosure. The attorney may exchange information and opinions with those officials who need such material to make corporate decisions. These communications and discussions, of course, retain their traditional privilege. Only factual material or reports collected by the corporate attorneys from employees outside the effective control group are subject to disclosure. In this respect, defendants cannot seriously contend that the public interest would be served by allowing the truth to be suppressed after a violation of law has occurred.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the writ of mandamus vacated.

Respectfully submitted,

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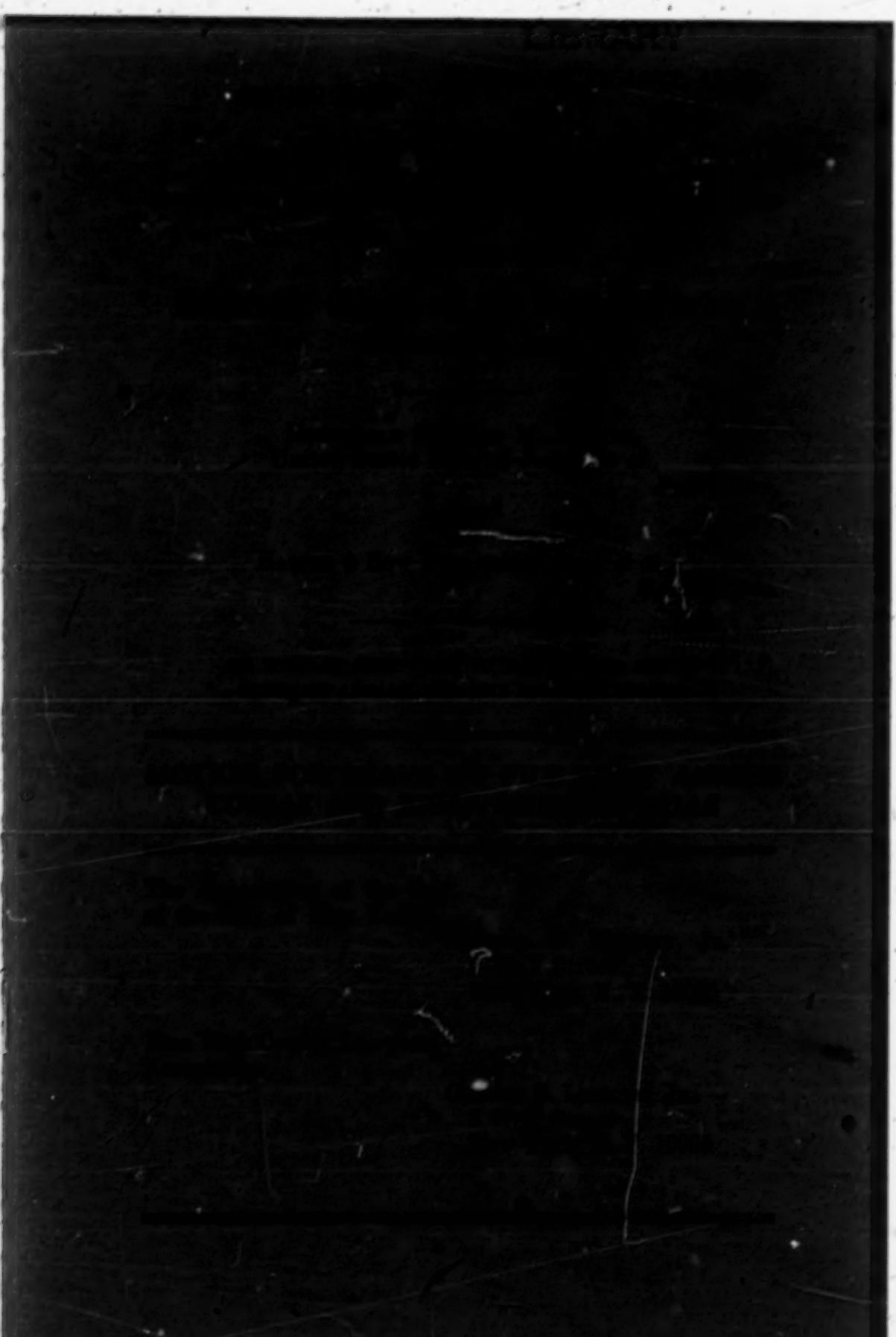

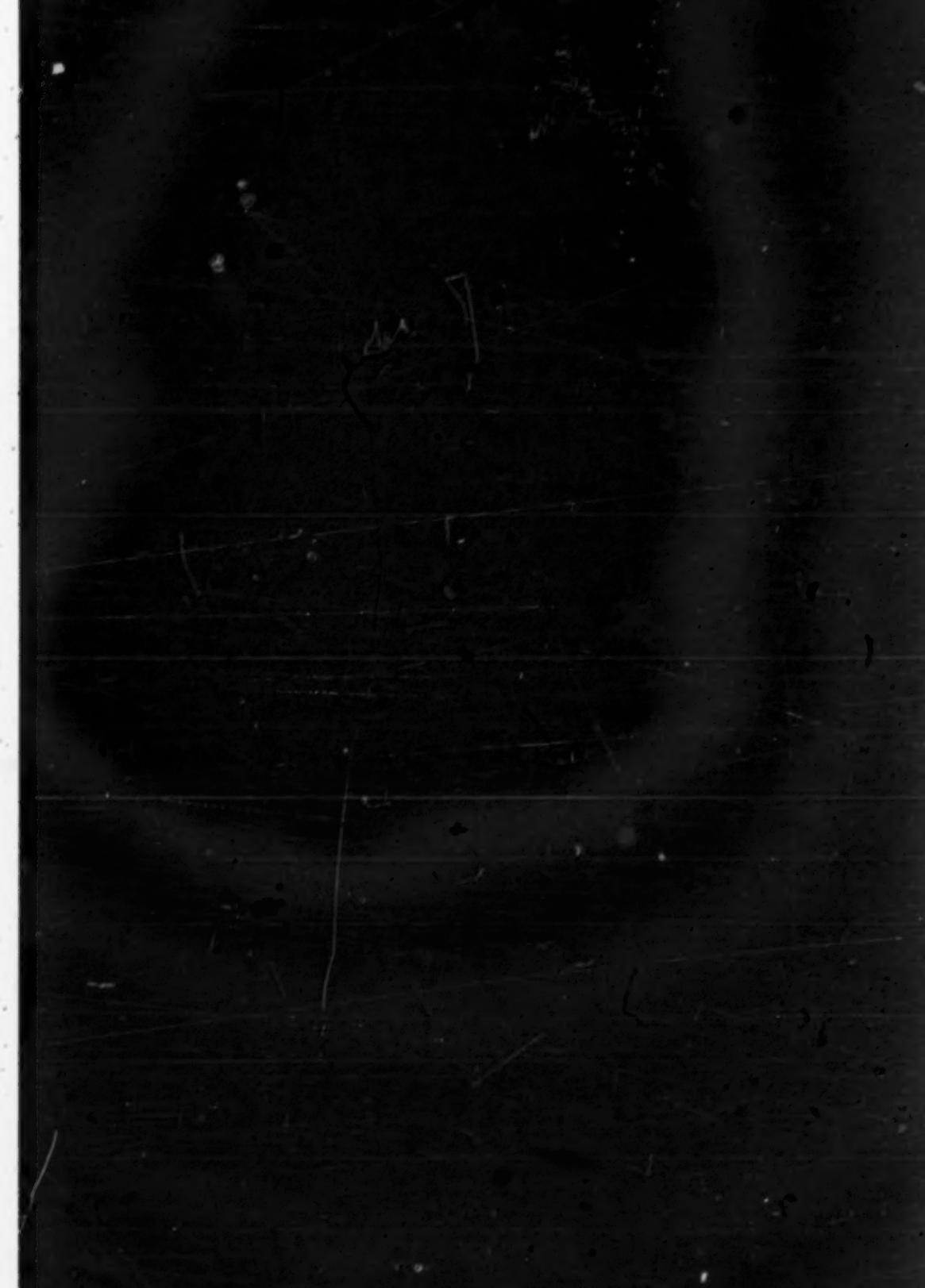

In The

Supreme Court of the United States

October Term, 1969

No. 1337

Honorable Bernard M. Decker,
United States District Judge, *et al.*,
Petitioners,

against

Harper & Row Publishers, Inc., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Association of the Bar of the City of New York and the New York County Lawyers' Association hereby respectfully move for leave to file the attached brief *amicus curiae*. Counsel for respondents have consented to the filing of this brief, but counsel for petitioners have declined to consent.

The Interest of the *Amicus Curiae*

This case presents an important question of the scope of protection against compelled disclosure to be afforded by the attorney-client privilege to communications between independent counsel and their corporate clients.

That question goes to the very roots of the relationship between every member of the Bar and his corporate clients. If private lawyers are to continue their role as trusted and confidential corporate counsellors whose advice and guidance is to a considerable extent necessary to the effective implementation of this country's extensive and complicated system of regulation by law, it is of overriding public importance that the Court lay down a clear and predictable definition of the attorney-corporate client privilege which will allow ample scope to the privilege as it relates to the practical aspects of a modern corporation's need to act through employees at all levels of its business.

The Association of the Bar of the City of New York and the New York County Lawyers' Asssociation submit that the so-called "control group" test which is urged by petitioners is so restrictive as to virtually eliminate the attorney-corporate client privilege and so uncertain in nature as to make prospective determination of its application all but impossible.

The Associations believe that the test applied in this case by the Court of Appeals for the Seventh Circuit is certain and predictable, and affords the protection necessary to the Bar's effective performance of its function and responsibility in advising corporate clients. Accordingly,

both Associations request permission to file the attached joint brief *amicus curiae* in partial support of respondents herein.

Respectfully submitted,

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Dated: New York, N. Y.
July 24, 1970.

To: All Counsel for Petitioners and Respondents.

No. 1337

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BRIEF *AMICUS CURIAE*

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BRIEF *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

The interest of the *amicus curiae* is set forth in the motion to which this brief is appended.

Statement of the Case

This petition arises out of consolidated pretrial proceedings being conducted pursuant to 28 U.S.C. §1407 before the Honorable Bernard M. Decker, United States District Judge for the Northern District of Illinois, in multi-district

treble damage antitrust cases involving the sale of library editions of children's books.

On October 17, 1969, Judge Decker entered an Order, on his memorandum opinion of October 7, 1969, permitting plaintiffs below to inspect and copy, *inter alia*, certain "debriefing" memoranda prepared by counsel for corporate respondents reflecting the results of interviews with corporate employees who had appeared before a federal grand jury investigating various aspects of the publishing industry.

Some of the persons interviewed were employees of respondent corporations at the time of the interview and were interviewed only by counsel for that particular corporation. Some of the persons interviewed were no longer employees at the time of the interview; others were employed by one of the respondents at the time of the interview, but were interviewed by counsel for another respondent.

Respondents had resisted production of those memoranda on the grounds that they were protected from disclosure by a privilege running between the interviewing attorney and his corporate client, or the interviewing attorney and the individual witness interviewed; and in any event because they were protected under the qualified privilege deriving from the work product doctrine.

In the course of his decision, Judge Decker held that the attorney-client privilege protects the confidentiality of communications between a corporate client and its attorneys only in so far as those communications are with a corporate agent or employee who is: (1) a responsible member of the corporation's management or control group; (2) seeking legal advice about the corporation's affairs; and (3) who is also in a position to influence the decision

about which legal counsel is sought (Petitioners' App. p. 16a).*

Judge Decker refused to make certification under 28 U.S.C. § 1292(b) and respondents sought a writ of mandamus in the Court of Appeals for the Seventh Circuit.

On appeal, the Seventh Circuit did not disturb Judge Decker's findings that no attorney-client relationship existed between a corporate respondent's attorney and witnesses interviewed who (a) were no longer employees of the corporate client at the time of the interview; or (b) were employees of one of the respondents when interviewed, but were interviewed by counsel for another respondent. Nor did the Circuit Court, by the vehicle of mandamus, disturb Judge Decker's finding that no personal attorney-client relationship existed between the corporate attorneys and the employees interviewed.

The Circuit Court did, however, conclude that Judge Decker had erred in limiting the attorney-client privilege to the "control group" in situations where corporate employees had been interviewed only by the attorneys representing that corporation. The Court first found: "It is sufficiently clear that each employee made his disclosure to the attorney at the direction of his corporate employer and on its behalf; and that the subject matter of his grand jury testimony and of the debriefing interview was

* This follows substantially the so-called "control group" test formulated in Judge Kirkpatrick's decision in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962) upon which Judge Decker relied. It is notable that Judge Decker apparently recognized that grand jury debriefing statements may in and of themselves be privileged communications, since he refused to require the production of the statements of witnesses Bonsal and Milne after finding that they were executives ". . . in a position to influence their company's litigation strategy in these lawsuits." (Petitioners' App. p. 17a).

germane to the duties of his employment." (Petitioners' App. p. 62a). The Court went on to rule:

> "We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.
>
> "It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.
>
> "We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.
>
> "And because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate". (Petitioners' App. p. 63a).

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 4, 1970 and amended by order of March 11, 1970. The petition for a writ of

certiorari was filed on March 20, 1970 and granted on May 4, 1970.

This brief *amicus curiae* is addressed solely to the District Court's application of the "control group" test and is not concerned with any other aspect of that Court's decision or with any other issue here presented by the parties.

Summary of Argument

As a juridical person entitled to the assistance of counsel, a corporation is entitled to the full protection of the attorney-client privilege which preserves the confidentiality of communications between any client and his attorney.

The "control group" test applied by the District Court imposes an undue restriction on that protection and would tend to discourage full and frank disclosure by corporations to their attorneys.

The Bar at large requires a determination of the scope of the attorney-corporate client privilege which is both certain and predictable and broad enough to permit it to perform its proper function in advising and representing corporate clients.

ARGUMENT

At issue is whether the attorney-client privilege between a corporation and its attorneys shall remain viable and predictable or whether it shall be unduly narrowed and left to the nebulous and impracticable "control group" test first enunciated by a District Court in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962).

Under the *Philadelphia* doctrine confidential communications between corporate personnel and corporate counsel

are privileged only if the corporate employee communicating with the attorney is a member of a so-called "control group" which seeks legal advice from counsel, or is in a position to influence the decision about which legal counsel is sought.*

Such a definition of privilege not only works an undesirable erosion of traditional concepts of the attorney-client privilege, but makes the existence of the privilege virtually unpredictable at the time when counsel is first approached and must give his client precise assurances with respect to the status of future communications with him.

No lengthy review of the origins and history of the attorney-client privilege need be recited for this Court, which in 1888 instructed that the attorney-client privilege ". . . is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure". *Hunt* v. *Blackburn*, 128 U. S. 464, 470 (1888).

There is no valid distinction between the need for the privilege between the attorney and an individual client and the attorney and his corporate client. Indeed, the modern day lawyer may be more frequently called upon by his corporate clients than by the individuals whom he represents. Much corporate legal advice is intended to

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* While the "control group" test has occasionally been applied by other courts since the *Philadelphia* decision, it has generally been quoted without explanation or reasoning and without recognition of contrary authority. See *Natta* v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963); and *Day* v. *Illinois Power Company*, 50 Ill. App. 2d 52, 199 N.E. 2d 802 (5th Dist. 1964).

be remedial and serves the socially desirable end of keeping corporate activity within the law. The necessity for mutual confidence and full disclosure in the corporate context is surely as urgent as it is in individual relationships:

> "A corporation is entitled to the same treatment as any other 'client'—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof." *Radiant Burners, Inc.* v. *American Gas Association,* 320 F. 2d 314, 324 (7th Cir. 1963), cert. den. 375 U. S. 929 (1963).

Dean Wigmore recognized that if the privilege is to be meaningful in a corporate context, it must attach to any appropriate communication with a corporate agent, whatever his position in the management hierarchy:

> "*Communications from the client's agent.* The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege." 8 Wigmore, *Evidence,* §2317 (McNaughton's rev. 1961) (Emphasis in original).

See also *United States* v. *United Shoe Machinery Corporation,* 89 F. Supp. 357 (D. Mass. 1950), and *Zenith Radio Corp.* v. *Radio Corp. of America,* 121 F. Supp. 792 (D. Del. 1954), where both Trial Judges recognized the necessity of protecting communications between the corporate

lawyer and a full range of corporate agents and employees.*

No lawyer can, nor should he be required to, render counsel without a thorough investigation of the underlying facts upon which his advice will be grounded. Such an investigation is the more important in anticipation of corporate counselling, because of the complex maze of regulatory legislation within which a corporation must now operate. It is equally evident that events or conduct of which the attorney must be apprised in order to advise a corporation are often peculiarly within the knowledge of lower echelon corporate employees and sometimes entirely beyond the ken of those who may be defined as within the "control group."

By way of example, let us suppose that the top management of a large manufacturing corporation requests independent counsel to conduct an in depth investigation of the marketing practices of one of its divisions with a view to obtaining recommendations and advice so as to insure compliance with the antitrust laws. Upon accepting the assignment, counsel is referred to the division executives who have been instructed to cooperate fully in the investigation and to require the same cooperation of every employee in the division. Counsel has no further interim dealings with the top management which retained him, but

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*The test applied by the Seventh Circuit for determining the scope of the attorney-corporate client privilege in no way conflicts with this Court's decision in *Hickman* v. *Taylor*, 329 U. S. 495 (1947). The employees interviewed by corporate counsel in *Hickman* were treated only as witnesses by this Court and not as agents of their corporate employer making confidential communications to counsel on behalf of their employer. "For present purposes, it suffices to note that the protective cloak of this [attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation". (*Id.* at p. 508).

commences his investigation at the lowest sales level and works his way up through the divisional hierarchy. Personal interviews are conducted by counsel and other lawyers in his office and separate memoranda are prepared reflecting and analyzing the results of each such interview. Based upon these memoranda, counsel then prepares a narrative factual statement describing the division's marketing activities, some of which counsel believes might be construed as violative of the antitrust laws, or at least unnecessarily close to the borderline of the law. Finally, counsel makes written recommendations suggesting specific changes in procedures which he believes will assist in avoiding legal pitfalls, and submits those proposals to the top management which retained him.

What are the consequences of this desirable effort if privilege is to be determined *ex post facto* by the "control group" test?

Is the "control group" limited to the top management which retained counsel, but in this instance gave him no factual information; or does it include some or all of the executives and other sales employees at the division level? Must these questions await later discretionary determination by a Court?

One thing is certain. Under the "control group" test, counsel may later be compelled to be a dangerous witness against his own client. His memoranda of interviews with lower echelon employees must be produced at the behest of a demanding plaintiff. Presumably counsel might be sworn and deposed, or called to the witness stand at trial, and be compelled to disgorge the information upon which he based his remedial recommendations.

With this predictable result (or even uncertain possibility), it takes little imagination to envision the limited

role which counsel will be willing to undertake in future counselling of such a nature.

Petitioners here contend that depriving them of the opportunity to peruse these few attorney's memoranda would result in ". . . allowing the truth to be suppressed . . ." (Brief of Petitioners, p. 37). All rules of privilege suppress information. But such rules are designed to foster truth in a forum other than the courtroom, even at the risk of non-disclosure during litigation. They represent a conscious decision by legislature or court of law to further extraneous social policies, such as preservation of the marital relation, and physician-patient and attorney-client relationships.

The attorney-client privilege should not be demeaned by characterizing it as a rule of exclusion as it applies to the circumstances of any particular lawsuit. Privileges reach far beyond the halls of the courthouse:

> "The privileges are guarantees for the benefit of their holders; they exist from the moment of their inception in the confidential communication; they normally survive all the vicissitudes of life save only waiver by the owner; they survive even his death. The law will protect them at all stages of their existence. If they are in the form of written documents, the law will protect them against theft, trespass, subpoena, or other infringement; if oral, from all types of seizure to which such are susceptible: coercion, physical or psychological, trickery or fraud. If the holder becomes involved in litigation, a new type of attack on his privilege may or may not be made in the discretion of his adversary. But if the attack is made, if the infringing question is propounded, the law through the judge will continue its protection by now affirmatively enveloping the holder in a cloak of silence. Realization that all this protection is for the holder of the privilege as such,

regardless of whether or not in litigation he becomes an adversary or neutral witness, perhaps most keenly focuses up that the exclusionary feature of the privileges, far from defining them, is only an incident of their vitality." Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 113-14 (1956).

Judge Rifkind has deplored the tendency toward erosion of the attorney-client privilege in an address given before the Fellows of the American College of Trial Lawyers in 1967:

> "What has gone unobserved is that *society's* need for such easy access between the client and the lawyer has grown ever more rapidly and more extensively. By this I mean that a very large area of regulation by law would today be impossible of enforcement were it not for the services of a highly sophisticated, well-informed and highly-principled Bar.
>
> * * * * * *
>
> "But in order to discharge this important function, the lawyer must enjoy the unlimited confidence of his client and unrestrained freedom to inquire of his client. These he will not achieve, nor, if he does achieve them, will he exercise them, unless he rests secure in the so-called lawyer's privilege, in the certainty that what he learns is not for the benefit of anyone except his client; that no agency of government, in a public or private cause, can compel disclosure.
>
> * * * * * *
>
> "The minute you start qualifying, the minute you start questioning, the minute you put limitations, at that point you nullify the tool which is indispensable to the carrying out of the lawyer's responsibility; and at that moment you are in trouble as far

as the honorable practice of your profession is concerned." (22 Record of N.Y.C.B.A. 566, 567, 568, 573 (1967)).

Petitioners set much store by the fact that the Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates (March 1969) embodies the "control group" test by defining "representative of the client" as "One having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." (Rule 5-03(a)(3)).

So it does. But the future of the Preliminary Draft of Proposed Rules of Evidence, as it seeks to encompass privileges, would seem a highly uncertain one. A Report prepared by a Committee of New York Trial Lawyers and submitted to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States declared: "The project conclusion is that privileges have no place in the proposed rules." (p. 29).* Even upon the assumption that the proposed rules relating to privileges would be promulgated, the Committee of New York Trial Lawyers specifically opposed codification of the corporate "control group" test and suggested language changes in the proposed rule. ". . . in order to encourage complete disclosure in communications between lower echelon employees and attorneys representing the employer." (*Id.* at p. 44).

The American College of Trial Lawyers recommended the following italicized language for the definition of "representative of the client" in lieu of the proposed language in brackets:

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*Recommendation and Study Relating to the Advisory Committee's Preliminary Draft of the Proposed Federal Rules of Evidence: Project of a Committee of New York Trial Lawyers. (June 1, 1970).

Proposed Rule 5-03(a)(3):

> "A 'representative of the client' is [one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client] *an agent or employee of the client who in the interest of the client obtains professional legal services or who on behalf of the client acts on professional legal advice or who at the instance of the client gives information to the client's lawyer.*" (Report of American College of Trial Lawyers Committee to Study the Proposed Rules of Evidence for United States District Courts and Magistrates, p. V(5), (February 1970)).

The Committee on the Federal Courts of the Bar Association of the City of New York had this to say with respect to the definition of "representative of the client" in the Proposed Rules:

> "This definition seriously limits the attorney-client privilege in the case of a corporation. While it does in fact follow the decision of Judge Kirkpatrick, *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), it is something of an overstatement to say, as does the Advisory Committee, that 'the rule reflects the trend of recent decisions'.
>
> . . . . . .
>
> "We disapprove the rule as drafted and recommend that 'representative of a client' be defined in such a way as to protect communications with lower echelon employees when such communication is in furtherance of the rendition of professional legal services." (Report with respect to the Proposed Rules of Evidence for the United States District Courts and Magistrates, Committee on the Federal Courts of the Association of the Bar of the City of New York, pp. 43-4, (May 28, 1970)).

The New York County Lawyers' Association also voiced its opposition to codifying the "control group" test in Rule

5-03(a)(3) of the Proposed Rules of Evidence. In its Report, submitted to the Committee on Rules of Practice and Procedure, it concluded:

> "If communications by lower echelon employees are not privileged the investigating lawyer could presumably be called upon at any time to produce records and to testify as to the substance of all such communications. It is suggested that rules of evidence should not result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity." (Report of the New York County Lawyers' Association on the Proposed Federal Rules of Evidence, Article V, p. 8, transmitted to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States under letter dated April 8, 1970).

Conclusion

The Bar at large needs assurance that corporate clients will be afforded the full protection offered by the attorney-client privilege and that the existence of that privilege will be both predictable and certain. The standard applied by the Court of Appeals for the Seventh Circuit provides that assurance, and the judgment should be affirmed.

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JUL 30 1970

IN THE

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OCTOBER TERM, 1970

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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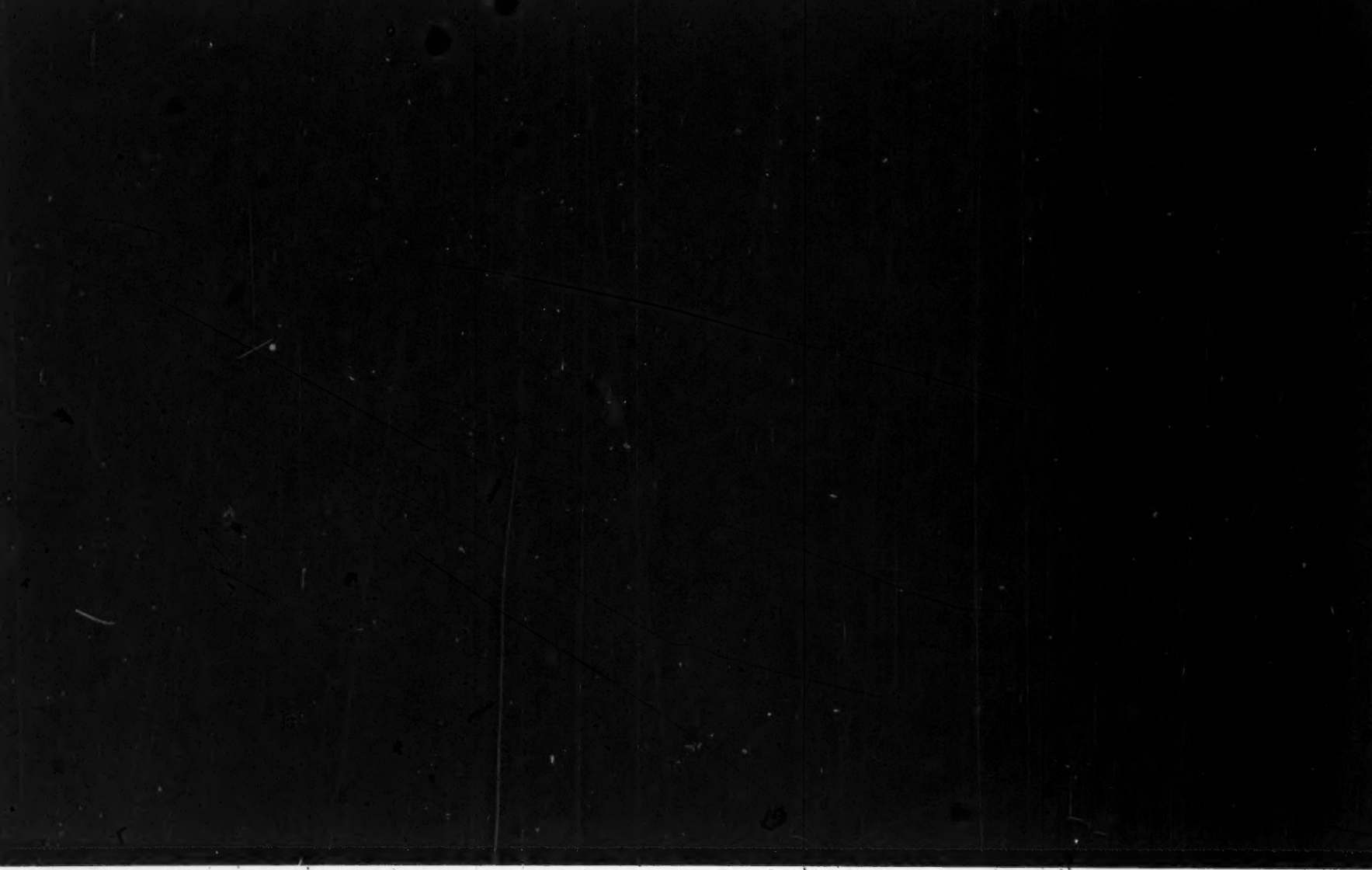

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 113

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

v.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Bar Association respectfully moves under paragraph 3 of Rule 42 of the Supreme Court Rules for leave to file a brief as *amicus curiae* in support of the position of respondents in this cause. The written consent of all respondents has been obtained. The consent of attorneys for petitioners has been requested but has been denied.

An authoritative delineation of the scope of the attorney-client privilege available to corporate clients will be an

event of great impact on the administration of justice and the legal profession. The great bulk of business activity in this country is carried on through corporate enterprises. The policy formulated by the Court will significantly affect the future representation of corporations and the individuals who are employees of those corporations.

The American Bar Association believes that the "control group test" adopted by the trial court, and espoused by petitioners, would effectively deprive corporations of the attorney-client privilege and deleteriously affect the legal representation of corporations and individuals in their employ. It submits that the test formulated by the court of appeals fairly balances the need for the uninhibited communication with counsel with the need for freedom of discovery in litigation.

The Court's action in this cause will significantly affect the entire spectrum of corporate attorney-client relationships. Petitioners and respondents must necessarily focus on the narrow aspect of the privilege concerning them directly. Thus the American Bar Association has reason to believe that the parties will not adequately present the questions raised by the impact of the privilege in areas beyond the very limited aspect involved in this cause. The Bar wishes to present the policy considerations it believes crucial to a proper delineation of the privilege. Particularly those relating to its impact on the Fifth Amendment rights of individual corporate employees and those relating to the bar's efficacy in securing voluntary observance of the law.

The significance of this cause to the administration of justice and the bar is such that it is appropriate for the Court to hear argument from the American Bar Association.

WHEREFORE the American Bar Association prays that this motion be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1970

No. 113

Honorable Bernard M. Decker,
United States District Judge, et al.,
Petitioners,

v.

Harper & Row Publishers, Inc., et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

OPINIONS BELOW AND JURISDICTION

Amicus adopts petitioners' statements of the opinions below and jurisdiction.

QUESTION PRESENTED

Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation in situations where, in the words of the court of appeals, "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment"?

STATEMENT OF THE CASE

Amicus adopts respondents' statement of the case.

INTEREST OF AMICUS CURIAE

Authoritative delineation of the scope of the attorney-client privilege as applied to corporations will be a determination of great import to the administration of justice and to the legal profession's role therein. Its significance will reach far beyond causes of the genre of this case. Amicus submits that acceptance of the "control group test" espoused by petitioners would substantially and adversely affect the entire spectrum of corporate attorney-client relationships. Inevitably, and properly, petitioners and respondents must focus on the facts of this particular cause. The interest of amicus is in focusing on the impact of the privilege in areas beyond the very limited aspect involved in this cause and presenting the policy considerations amicus believes crucial.

ARGUMENT

(1) The Court Of Appeals' Formulation Of the Privilege Is a Balanced and Fair One

The radical constriction of the privilege which would occur with adoption of the "control group test," would effectively deny the privilege to corporations — a result both unsound and unnecessary. Even under the test formulated by the court of appeals, application of the privilege would be extremely narrow. A corporation can claim the privilege under that test only when the eight require-

ments of Wigmore's classic formulation* are met, plus the following five additional requirements:

(1) The communicant must be an employee

(2) who communicated with the corporation's attorneys at the direction of his superiors

(3) where the subject matter upon which the attorney's advice is sought by the corporation, and

(4) dealt with in the communication,

(5) is the performance by the employee of the duties of his employment.

The court of appeals expressly avoided devising a test covering the testimony of agents interrogated as mere witnesses. App. 63a, 423 F.2d at 491-92.

Of course, an adversary can extensively depose agents as to whose communications to attorneys the corporation is entitled to claim the privilege. The ultimate facts within the knowledge of the agent are not covered by the privilege. Further, there are alternative discovery devices. For example, in this case, grand jury testimony has been made available. App. 8a-14a, 1969 CCH Trade Cas. ¶ 72,965 at 87,750-52. The vast array of mandatory corporate records, if otherwise discoverable, cannot be placed beyond the reach of an adversary by placing them in the hands of an attorney.

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* There is apparently no dispute between the parties as to the validity of Wigmore's formulation of the attorney-client privilege:

(1) Where legal advice of any kind is sought,
(2) from a professional legal adviser in his capacity as such,
(3) the communications relating to that purpose,
(4) made in confidence,
(5) by the client,
(6) are at his instance permanently protected,
(7) from disclosure by himself or by the legal adviser,
(8) except the protection be waived.

8 J. WIGMORE, EVIDENCE § 2292 at 554 (McNAUGHTON rev. 1961).

Federal district courts have been able to apply fairly in a corporate context a test far broader than the one annunciated by the court of appeals. *See United States* v. *United Shoe Machinery Corporation,* 89 F. Supp. 357 (D. Mass. 1950); *Zenith Radio Corporation* v. *RCA,* 121 F. Supp. 792 (D. Del. 1954); *American Cynamid Company* v. *Hercules Powder Company,* 211 F. Supp. 85 (D. Del. 1962). It would be a very rare cause where a party could not fairly present its case without examining the corporation's attorney or seizing his papers covering the small area protected by the corporate attorney-client privilege formulated by the court of appeals. Such cases do not merit the cost to the administration of justice that the "control group test" would exact.

(2) The Court Faces the Question Whether It Is In the Interest Of the Administration Of Justice To Deprive Corporations Of the Attorney-Client Privilege

In urging the "control group test," petitioners urge this Court in effect to deprive corporations of the attorney-client privilege in significant corporate transactions. The test limits the privilege's application to communications by corporate agents who will play a substantial role in determining how the corporation will act on the resultant advice. In creating it, Judge Kirkpatrick recognized that, in matters which are significant to the corporation, a relatively small group of corporate agents, such as the board of directors, controls what action the corporation will take. Almost inevitably, the corporate agents possessing relevant factual data are middle management or lower, operational executives. Contrary to the basic purpose of the privilege — the encouragement of uninhibited communication with attorneys as to the relevent facts — the "control group test"

is not designed to protect factual communications by the corporate agents possessing the information. It limits itself to providing partial protection for the secondary aspect of the privilege, the receipt of advice from attorneys by the control group.

The Court faces then, not a mere choice between variants of the attorney-client privilege in a corporate context, but the question whether the administration of justice would be served by effectively depriving corporations of the attorney-client privilege.

This cause itself deals only with memoranda made in anticipation of litigation — a narrow segment of the privilege's application in the corporate context. However, adoption of the "control group test" would have drastic impact over the entire range of corporate attorney-client relationships which involve almost every aspect of a corporation's daily operations. Corporate counsel would be forced to work on the assumption that all communications with non-control group personnel are discoverable. Since the size of the control group diminishes as the significance of a matter grows, the size of the group cannot be known in advance where a matter of potentially substantial significance is involved. If litigation were to arise, it might develop that the significance of the matter was such that the control group would consist of only the board of directors. Thus, corporate attorneys could not prudently rely on the attorney-client privilege in any matter which possessed the potential of becoming significant.

As we shall demonstrate, this radical revision of the attorney-client privilege would adversely affect the administration of justice in this country by impeding effective counseling of corporations and damaging the individual rights of their agents. This consequence is too high a price for

making the confidential communications available for discovery.

This availability would prove to be illusory once the new rule was adopted. If corporate counsel were forced to operate without the privilege, dishonest lawyers would simply conceal the communications; prudent lawyers would make certain that no such evidence was created. Debriefing memoranda such as those involved in this cause would simply not be made. Awkward as it would be, prudent corporate lawyers would simply not gather information that would be harmful to their corporate clients in an adversary proceeding. Because the logical consequence of the "control group test" would be cross-examination of corporate counsel, they would be forced to limit their probing for facts, lest their testimony on cross-examination form the strongest evidence in support of an attack on their client.

(3) The Attorney-Client Privilege Serves the Same Valuable Purpose Of Encouraging Uninhibited Communication In a Corporate Context As It Does For Individuals

The basic purpose of the attorney-client privilege is "that of encouraging clients to lay the facts fully before their counsel." *See* C. McCORMICK, EVIDENCE § 96 at 195 (1954). To accomplish this "the apprehension of compelled disclosure by the legal advisers must be removed." 8 J. WIGMORE, EVIDENCE § 2291 at 545 (McNaughton rev. 1961). The common law has long recognized that full and uninhibited disclosure to one's attorney is so crucial to the proper functioning of the adversary system that it must be treated as privileged even though, as with all privileges, some burden is thereby placed upon discovery processes. No lawyer can effectively advise and

represent a client without full knowledge of the client's side of the story. These considerations are as applicable in a corporate context as they are for individuals. This Court recognized the corporation's need of the privilege over fifty years ago:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

United States v. *Louisville & Nashville Railroad Company*, 236 U.S. 318, 336 (1915) (An attempt by the United States to obtain corporate files including communications between agents of the corporation and its attorneys).

Neither the need for the application of the attorney-client privilege in the corporate context nor the validity of the Court's observation that abolition of the privilege would amount to a practical prohibition on the exchange of information has been diminished since *Louisville*. Today the American corporation must exist in a great welter of regulatory statutes whose observance requires legal advice on virtually every aspect of its affairs. Every transaction involving corporate financing, its competitors, its customers, its employees or foreign trade, is governed by complex regulatory statutes which, in most instances, in addition to subjecting the corporation to severe risks, subject the corporate agents to criminal penalties. If a corporation is to comply with the law, it must have legal counsel freely available at all levels of its operations.

(4) The Corporate Attorney-Client Privilege Is An Aid To Achieving Voluntary Compliance With the Law By Corporations

As many students of jurisprudence have pointed out, the private bar is an extremely important factor in achieving voluntary compliance with the law. The prosecutorial agencies and government administrative agencies could not hope to achieve widespread compliance without the assistance of the bar. Functioning properly, the bar instructs its clientele as to the meaning of the law, alerts them to risks and pushes them toward compliance. *See* ABA Canons of Professional Ethics No. 16. For the bar to be able to perform this function, it must be free to extract from its clients full details of their conduct.

This is particularly crucial in day-to-day counseling at the lower levels of corporate management. For example, those who encounter difficulties with the antitrust laws are usually middle or lower management personnel who are actually involved in the marketing process. Prudent corporate management will provide for extensive counseling of these personnel by corporate attorneys. As members of this Court have many times observed, the application of the antitrust laws can be bewilderingly complex. The securities laws are another example. Conduct at many levels of the corporate hierarchy from field men on up can place both the corporation and the individual in jeopardy. *See, e.g., Securities and Exchange Commission* v. *Texas Gulf Sulphur Company*, 401 F. 2d 833 (2d Cir. 1968), *cert. denied sub nom., Coates* v. *Securities and Exchange Commission*, 394 U.S. 976 (1969).

A layman could not hope to evaluate the significance of factual variations and distinctions, shadings of difference between various situations. He must be free to lay his case

entirely before the corporation's lawyers — certainly in most instances he cannot be expected to afford his own counsel to advise him. Yet, under the "control group test," all of these people would be stripped of the attorney-client privilege. It would no longer be prudent for a corporation to have its lawyers carefully and regularly gather facts about its operations. The gathering of such information might be fatal in some unanticipated lawsuit. The sophisticated lawyer would not wish to learn too much. The employee would have to stumble warily along seeking to ask questions which would enlighten him as to the law, while at the same time concealing from the lawyer any evidence of what the employee guessed might be violations of the law. The lawyer would have to suppress judgments as to the uncertainty of the legality of conduct for fear that the employee might some day be forced to repeat his words before a jury. This clogged and inhibited communication would demoralize the attorney-client relationship and cripple the bar's power to counsel and guide.

(5) Recognition Of the Corporate Attorney-Client Privilege Is Essential To Protect the Individual Corporate Employee's Fifth Amendment Privilege Against Self-Incrimination

Almost inevitably when a corporation is charged with either civil or criminal violations of regulatory laws, criminal charges could be brought against individual corporate employees on the same theory underlying the complaint against the corporation. *See, e.g., United States* v. *Wise*, 370 U.S. 405 (1962); *United States* v. *Dotterweich*, 320 U.S. 277 (1943).

Refusal to recognize a reasonable corporate attorney-client privilege would be destructive of the individual's privilege against self-incrimination. All communications

by the individuals with lawyers for the corporation over the past several years would be subject to discovery by examination of the corporate counsel. Thus, by seeking advice from the corporation's attorneys on how to conduct the corporation's affairs, and making a full disclosure in doing so, the individuals would have effectively waived their Fifth Amendment privilege as to any incriminating testimony.

In cases where the corporation's counsel determined that their need to develop information after charges were brought justified the risk of discovery, it would lead to economic pressure being placed upon the individual to confide in a corporation's attorney—even though such communications would effectively amount to a waiver of the individual's privilege against self-incrimination. The individual might be forced to choose between his loyalty to his employer (his livelihood) and his Fifth Amendment rights. This Court should avoid a formulation of the privilege with this inherent vice. *Cf. Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968).

Clearly, those individuals who were sophisticated and affluent enough to obtain counsel of their own would be advised by those counsel simply not to discuss the matters in question with the corporate counsel. Even those witnesses who had been called before the grand jury and thereby received some degree of immunity from further prosecution (in those areas where there are applicable immunity statutes) might be advised by their counsel not to communicate with corporate attorneys. Areas might be developed that were not covered by the grand jury and as to which the corporate executives could not claim immunity because of their grand jury appearance. *See United States* v. *Zirpolo*, 288 F. Supp. 993, 1002-07 (D.N.J. 1968). *Cf.*

Malloy v. *Hogan*, 378 U.S. 1 (1964). Those who had not been called before a grand jury would simply have to refuse to make any disclosures. Even Professor Morgan, who sees the privilege as involving only a simple dichotomy between truth and lies, recognizes that: "In situations where the privilege against self-incrimination is involved, the retention of the [attorney-client] privilege is justified." Morgan, Foreword to MODEL CODE OF EVIDENCE 27 (1942). As we have discussed, almost every significant aspect of modern corporate activity involves both potential liability for the corporation and potential criminal liability for its individual agents.

(6) Recognition Of the Attorney-Client Privilege Is Essential If the Adversary System Is To Function Fairly

If a lawyer is to represent properly a corporation in the type of security, antitrust and regulatory litigation which flourishes today, he must be able to make an untrammeled factual investigation. So long as the attorney-client privilege is recognized, he can examine his clients vigorously and exhaustively. His clients, of course, do not "know" the facts, that is to say they do not appreciate the significance of such data as they recollect; their instinct is to speak in guarded half-truths concealing what they believe to be unfavorable. *See* C. McCORMICK, EVIDENCE § 91 at 181-82 & § 100 at 202 (1954). The lawyer's factual knowledge or memoranda will not reflect the "truth," but rather the mosaic he has built from the incoherent, inconsistent and flickering recollections and understandings of the agents of his client. As his understanding of the case deepens, his judgment as to the accuracy of various agents may alter; his perception of what transpired may change radically. Ultimately he will give advice based on his understanding

of the facts; if litigation ensues, he will attempt to present a coherent picture to the finder of fact which casts the facts in their most favorable light. It is, of course, the function of his adversary to marshall the facts and present them in the worst light. Neither will ever learn all the facts. It is our society's commitment, however, that justice is most likely to be achieved through forceful partisan representation by counsel.

Stripping the corporation of the attorney-client privilege, as the "control group test" would effectively do, would not lead to greater likelihood of reaching the "truth." By inhibiting corporate counsel's research, it would diminish it. It would give the corporation's adversaries powerful and unfair forensic weapons which would lessen the likelihood of just results in litigation. The remarks of Mr. Justice Jackson, joined by Mr. Justice Frankfurter, concurring in *Hickman* v. *Taylor*, illustrate the problems of making witnesses of lawyers. These considerations apply with far greater force when what is involved is communications not by mere witnesses, but by the very corporate agents alleged to have committed the acts creating the alleged liability of the corporation. Counsel for corporations' adversaries would be all the more eager to engage in the practices Justice Jackson feared and condemned:

> I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the

witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility — perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Hickman v. *Taylor*, 329 U.S. 495, 516-18 (1947).

As we have indicated, the unscrupulous advocate could largely avoid the threats posed by the "control group

test." He could destroy documents, fabricate testimony, etc., and gain new advantages over his conscientious adversary. The honest and prudent advocate, however, would be put in a position of limiting examinations of his own client's agents, lest he thereby build a case for his adversary, subjecting himself to cross-examination that would be devastating to his client; or effectively destroying the individual Fifth Amendment privilege of one of the corporate employees. He would no longer create factual memoranda — either to record grand jury debriefing or as a mnemonic device — unless confident he was willing to have it discovered. In sum, much of his energies in counseling would be taken by the purely negative and debilitating task of avoiding the creation of ammunition for his existing or potential adversaries.

This diminution of the factual foundation of corporate representation would impede possible settlements of causes. An attorney cannot properly evaluate a case and recommend settlement until he has the full factual picture in his hand. Yet, his development of the picture from non-control group employees would necessarily be limited and cautious. Many prudent attorneys would doubtless prefer to wait and see how much their adversaries discovered. Thus, many proceedings would be prolonged.

(7) The "Control Group Test" Is Based On a Faulty Conceptual Analysis Of the Privilege

The "control group test" was created by Judge Kirkpatrick. *City of Philadelphia* v. *Westinghouse Electric Corporation*, 210 F. Supp. 483 (E.D. Pa.), *petition for mandamus denied sub nom., General Electic Company* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943

(1963). Nominally accepting Wigmore's formulation of the privilege, he held that it was available to corporations only if the employee making the communication to the attorney was in a position to take a substantial part in a decision about any action which the corporation might take upon advice of the attorney. 210 F. Supp. at 485. Judge Kirkpatrick's formulation was a novel and radical innovation.

As we have discussed, the "control group test" amounts to the effective deprivation of the attorney-client privilege for corporations. Judge Kirkpatrick, however, gave no articulate analysis or attention to the policy considerations involved in this drastic change in the law. None of the cluster of courts which followed Judge Kirkpatrick in adopting the test have ever given articulate consideration to the policy questions involved. *See Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968) (No party challenged the validity of the test); *Honeywell, Inc.* v. *Piper Aircraft Corporation*, 1970 Trade Cas. ¶ 73,122 (M.D. Pa. 1970). (The court chose the "control group test" over the court of appeals' formulation. However, it pointed out that, in any event, the party claiming the privilege had in most instances failed to make a showing which would have entitled it to the privilege under the court of appeals' formulation. 1970 Trade Cas., *supra* at 88,424 & n.1); *Garrison* v. *General Motors Corporation*, 213 F. Supp. 515 (S.D. Cal. 1963) (The corporation relied on the "control group test" as supporting its claim of privilege); *Day* v. *Illinois Power Company*, 50 Ill. App.2d 52, 199 N.E.2d 802 (5th Dist. 1964).

The preliminary draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 249-51 (March 1969) also follows the "control

group test." However, the Advisory Committee's Note merely conclusorily follows *City of Philadelphia*. *See* 46 F.R.D. at 252-53. And discussions by committee members indicate that they relied heavily on Judge Kirkpatrick without independent analysis. *See* Berger, "Discussion of the Proposed Federal Rules of Evidence: Privileges," 48 F.R.D. 39, 44, 45-46 (1969). Amicus hopes that, after the many criticisms leveled against the preliminary draft, the portion containing the "control group test" will not be adopted. *See, e.g.*, JOINT REPORT OF THE ABA SPECIAL COMMITTEE ON UNIFORM EVIDENCE RULES FOR FEDERAL COURTS AND THE ABA SPECIAL COMMITTEE ON FEDERAL RULES OF PROCEDURE (1970) (Filed by letter of Vincent L. McKusick to Honorable Albert B. Maris, Chairman, Standing Committee on Rules of Practice and Procedure, March 30, 1970), wherein the Special Committees strongly urge that Rule 5-03(a)(3) be revised to read substantially as follows:

> (3) A "representative of the client" is one (a) having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or (b) authorized by the client to disclose or furnish to the client's lawyer or a representative of such lawyer confidential communications, data or information.

See also, the criticisms cited in the Joint Amicus Brief of the Association of the Bar of the City of New York and the New York County Lawyers' Association at 12-14.

As we have sought to demonstrate, adoption of the "control group test" would have adverse effects on the administration of justice and would not have offsetting beneficent effects. Without attempting to balance these considera-

tions, Judge Kirkpatrick reached the "control group test" on a faulty conceptual analysis. He nominally accepted the classic formulation of the privilege in beginning his analysis. However, he then critically distorted the "basic requirement . . . that the communication must be made by the client to enable the lawyer to advise him." 210 F. Supp. at 484-85. He reasoned that under the privilege this meant that the individual making the communication had to be the individual seeking advice. Contrary to Judge Kirkpatrick's position that he was merely restating a fundamental requirement of the privilege, this requirement was a distortion of the privilege with no precedential support. It has for centuries been the rule that a communication made by a client's agent to the client's attorney falls within the scope of the privilege regardless whether the agent or client (whether individual, corporation, etc.) received the advice and acted upon it. *See* 8 J. WIGMORE, EVIDENCE § 2317 at 618 (McNaughton rev. 1961); C. McCORMICK, EVIDENCE § 100 at 204 (1954); 3 B. JONES, THE LAW OF EVIDENCE § 831 at 1560 (Gard rev. 1958); UNIFORM RULE OF EVIDENCE 26(3); MODEL CODE OF EVIDENCE rule 210(c)(ii) (1942).

While Judge Kirkpatrick's formulation is ostensibly related only to corporations, under his logic an individual (or any other entity) would automatically lose the privilege for communications made by an agent to his attorney, except where he had given his agent power to make decisions regarding the litigation. Such has never been the law.

Judge Kirkpatrick erroneously relied on *Hickman* v. *Taylor*, 329 U.S. 495 (1947) for this proposition. However, *Hickman* simply did not address itself to the question of communications by an agent regarding the performance of the duties of his employment. It involved the sinking of a

tug because of the negligent instructions issued to the tug's captain by a member of the partnership which owned it. Wrongful death claims were made by the families of a number of crew members who drowned. All of the surviving employees whose statements were sought also had claims against the tug owners. (Record in *Hickman* v. *Taylor* at 70a.) *See Hickman* v. *Taylor*, 75 F. Supp. 528, 530-31 (E.D. Pa. 1947) (Opinion on the Merits), *aff'd*, 170 F.2d 327 (3d Cir. 1948), *cert. denied*, 336 U.S. 906 (1949). These employees were properly cast in the role of adverse third parties by the parties and by every court which considered the cause. *See* Brief for Petitioner in *Hickman* v. *Taylor* at 14; 4 F.R.D. 479, 482 (E.D. Pa. 1945); 153 F.2d 212, 222 (3d Cir. 1945); 329 U.S. 495, 506 (1947). The respondents in *Hickman* could not have based a claim of privilege on the employee's agency relationship because the privilege is inapplicable where the agent is being interviewed as one whose interests are adverse to those of the principal. *Becher* v. *United States*, 5 F.2d 45, 49 (2d Cir.), *cert. denied*, 267 U.S. 602 (1924).

Further in *Hickman*, the respondents argued that *"attorneys as a class* should be 'privileged.'" Brief for Respondents at 18) (emphasis supplied). In denying that the attorneys' entire trial preparation was privileged, the Court did not have before it any claim of privilege based on an agency relationship. 329 U.S. at 508. The question whether an agent's communication at the behest of his principal regarding the performance of his duties is privileged was not before the Court. The reliance on *Hickman* by Judge Kirkpatrick, and by petitioners in this cause (Brief for Petitioners at 28) is misplaced. Thus, the "con-

trol group test" clearly is not dictated or supported by the precedential effect of *Hickman*.

Using his distorted formulation of the privilege as a premise, Judge Kirkpatrick then asked what he saw as the critical question: "In other words, was he [the corporate employee] at the time, in contemplation of law, the corporation seeking advice?" 210 F. Supp. at 485. Under Judge Kirkpatrick's formulation of the privilege where the individual communicating facts must be the same individual who will make the decision on how to act on the attorney's advice, the "control group test" mechanically follows. If the corporation is forced to act through two agents in dealing with its attorney, one to communicate the facts and another to make a decision based on the attorney's advice, it must forfeit the privilege. As we have demonstrated, however, there is no historical basis for this gloss on the privilege. Prior to Judge Kirkpatrick, no court had suggested that the mere creation of a duality between the factual source of the client's communication and the decision making power of the client caused a forfeiture of the privilege.

The conceptual inadequacy of Judge Kirkpatrick's formulation is clear. That is the sole articulated basis of his decision. He failed to analyze the policy considerations involved. We submit that *City of Philadelphia*, and its progeny following the "control group test," are not entitled to precedential respect by the Court.

CONCLUSION

The American Bar Association urges the Court to affirm the decision of the court of appeals in this cause.

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No. 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 113

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation in situations where, in the words of the Court of Appeals, "the employee makes the communication at the direction of his superiors in the corporation and * * * the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment"?

2. Whether the Court of Appeals properly exercised its discretion in issuing a writ of mandamus to direct that, in accordance with the above test, plaintiffs' counsel should not be permitted access to 17 attorneys' memoranda which reflect communications between the attorneys and employees of their corporate clients?

STATEMENT OF THE CASE

The petition herein arises out of discovery proceedings in a number of private antitrust treble damage actions (alleging price-fixing in the sale of library editions of children's books) which have been consolidated for pretrial purposes (pursuant to 28 U.S.C. § 1407) before petitioner, Honorable Bernard M. Decker, Judge of the United States District Court for the Northern District of Illinois. The petitioners here are, in addition to Judge Decker, various plaintiffs in those treble damage actions ("plaintiffs"); respondents here are some of the defendants in those actions ("defendants").

In particular, the petition relates to plaintiffs' efforts to obtain disclosure of 17 attorneys' memoranda. Each of those memoranda was prepared by an attorney for one of the corporate defendants, and describes the attorney's confidential communications with an employee of his corporate client. The employees in question were sales executives, regional managers, and sales personnel, each of whom conferred with an attorney for his corporate employer regarding his appearance before a federal grand jury (App. 14, 17, 23-24).

The 17 attorneys' memoranda, as well as various other documents, were the subject of a motion for production of documents which plaintiffs filed in August, 1969. At that time, defendants opposed disclosure of the 17 attorneys' memoranda on the ground, *inter alia*, that their confiden-

tiality was protected by the attorney-client privilege. On August 7, 1969 Judge Decker ordered defendants to submit under seal all memoranda which they claimed were protected by the attorney-client privilege, and to file, with respect to each such memorandum, "a precise factual statement setting forth the circumstances under which the document was prepared" (App. 6).*

Accordingly, defendants' counsel filed affidavits and factual statements which were limited in scope to the requirements of that order: the statements described only the circumstances under which the attorneys' memoranda had been prepared, but *not* their contents. Since the 17 attorneys' memoranda are still held under seal and have not been read either by Judge Decker (App. 14, n. 11) or by the plaintiffs, the record offers no support for plaintiffs' various assertions with respect to the contents of those memoranda (Pl. Br., pp. 18, 29, 32-33, 36).

In an opinion dated October 7, 1969, Judge Decker concluded, *inter alia*, that the attorney-client privilege did not extend to the 17 attorneys' memoranda. He held that the privilege preserves the confidentiality of communications

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* By requiring that the memoranda be submitted under seal, Judge Decker obtained possession of them before he ordered their disclosure. He subsequently ignored requests by various defense counsel that the memoranda be returned to them (*e.g.*, App. 98). As a result, Judge Decker precluded defendants from disobeying his order directing disclosure of the documents, and from obtaining appellate review of that order through a contempt proceeding. Ordinarily, of course, a litigant can obtain appellate review of a disputed discovery order in that manner. *Cf. Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951). Because Judge Decker also refused to certify the issue for interlocutory review pursuant to 28 U.S.C. § 1292(b), defendants could obtain immediate appellate review of his order only by petitioning the Court of Appeals for a writ of mandamus.

between an attorney for a corporation and an employee of the corporation *only* if the employee is (1) "a responsible member of the corporation's management or control group," who is (2) seeking "legal advice about corporate affairs," *and* who also is (3) "in a position to influence the decision about which legal counsel is sought" (App. 16). Judge Decker found that only two of the attorneys' memoranda before him met that test.

In the same October 7, 1969 opinion, Judge Decker ordered disclosure of the grand jury testimony of nine individuals who allegedly had been evasive and recalcitrant at their depositions.* He also ordered production of certain other attorneys' memoranda (not among the 17 at issue here) which defendants had contended were protected only by an attorney-client privilege arising out of *personal* (as distinguished from *corporate*) attorney-client relationships, by the work product doctrine, or by both. We refer to these other portions of Judge Decker's decision, which are not in issue here and which were concerned primarily with memoranda reflecting attorneys' conferences with other witnesses not here involved, because plaintiffs' brief (pp. 4-5, 31-32) relies on statements made by Judge Decker in connection with his determination of these other issues.

On October 17, 1969, Judge Decker entered an order incorporating the rulings which he had made in his October 7 opinion. Defendants requested that the order include a statement of certification pursuant to 28 U.S.C. § 1292(b), so as to permit an immediate appeal with respect to certain questions raised by the opinion and order, but Judge Decker denied the requested certification.

---

*Only five of those persons are among the 17 who are the subjects of the attorneys' memoranda which are at issue here.

Defendants thereupon petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus compelling Judge Decker to vacate certain portions of his October 17, 1969 order. After the filing of briefs, the Court of Appeals held, in an opinion dated February 4, 1970, that the "control group" test was unsound as a matter of law, and issued a writ of mandamus to prevent disclosure of the 17 memoranda which reflect attorneys' communications with employees of their corporate clients. In concluding that the protection which the attorney-client privilege affords to corporate clients should not be limited by the "control group" test, the Court of Appeals said:

> "We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.
>
> "It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.
>
> "We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (App. 63.)

The opinion of the Court of Appeals concluded that

> "* * * because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (App. 63.)

The Court of Appeals declined, however, to issue a writ of mandamus preventing disclosure of the attorneys' memoranda for which defendants had claimed confidentiality by virtue of a personal attorney-client privilege of each witness, and/or the work product doctrine.*

---

* The Court of Appeals did not discuss the merits of Judge Decker's novel ruling that where an attorney confers with an employee of his corporate client regarding the employee's grand jury testimony, no *personal* attorney-client privilege can properly be asserted to protect the confidentiality of their communications, *unless* the attorneys either "(1) render personal legal advice after the witnesses complete their grand jury testimony, (2) advise them on other, personal matters [unrelated to their grand jury testimony], or (3) bill the witnesses for their [legal] services" (App. 15-16). Instead, with respect to the claim of *personal* attorney-client privilege, the Court of Appeals held that the corporate defendants could not properly assert a personal privilege on behalf of the individuals involved, and also that "the existence of personal attorney-client relationships [was not] so clearly established that mandamus is appropriate to compel the district court to recognize the privilege which would arise therefrom" (App. 61).

The Court of Appeals also declined to issue a writ of mandamus with respect to the claim of work product protection, holding that "lack of good cause [for disclosure of attorneys' work product] has not been made to appear sufficiently for issuance of a writ of mandamus", even though "more specific findings [of good cause] as to each individual would have been better" (App. 65). The Court of Appeals did conclude, however, that "the district judge incorrectly suggested that some of the memoranda did not qualify

(continued on p. 7)

The issue which the petition for certiorari brings before this Court is whether the Court of Appeals properly concluded that the "control group" test is unsound as a matter of law. The importance of that issue and the consequences of this Court's resolution of it far transcend the limited significance of the 17 attorneys' memoranda whose confidentiality was protected by the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

I

A. The attorney-client privilege is predicated upon the belief that it is in the public interest to encourage free and candid communications between clients and their attorneys, by protecting the confidentiality of such communications. *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915); *Chirac* v. *Reinicker*, 11 Wheat. (24 U.S.) 280, 294 (1826). The privilege extends not only to individual clients but also to corporations who, of course, act through their agents and employees. The privilege always has been deemed to include communications between the attorney and the client's agents (8 Wigmore, *Evidence*, § 2317).

The decision of the Court of Appeals, unlike the "control group" test applied by Judge Decker, is consistent with this long-established doctrine and the reasons which support it. The attorney-client privilege enables a lawyer to give legal advice and perform legal service on the basis

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(footnote continued from p. 6)

as work product because 'the lawyers functioned primarily as investigators' ", and that the correct rule is that "Where an attorney personally prepares a memorandum of an interview with a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator" (App. 64).

of full and candid disclosure of the facts known to his client. An attorney should not be confronted with the dilemma of either advising his client without knowledge of all relevant facts, or of obtaining the necessary information from the client's agents and employees at the risk of having to divulge it to an adverse party. Since first-hand knowledge of relevant facts is usually possessed by corporate agents or employees who are not members of the "control group", the practical effect of the "control group" test would be to deprive corporations of the protection of the attorney-client privilege with respect to most of what they do.

The "control group" test produces the incongruous result that subordinate corporate employees for whose conduct a corporation is liable, and whose knowledge is imputed to it, cannot speak confidentially to the corporation's attorneys about the acts which they performed on the corporation's behalf.

In addition, under the "control group" test a corporation's lawyer could not give advice in confidence to the many officials or employees below the "control group" level whose conduct is to be guided by that advice, such as the sales managers or salesmen involved in price fixing cases such as these. In order to be most effective, legal advice must be given directly to those persons whose conduct is to be affected or influenced by it.

The privilege serves the public interest not only because it enables persons to benefit from soundly based legal advice, but also because such advice induces compliance with the law. This deterrent effect of the privilege is especially important in the case of corporate clients, which frequently face complicated and difficult legal questions.

The public interests which the privilege serves would be thwarted to a substantial extent by adoption of the "control

group" test, which would render the privilege inapplicable to most communications between corporate attorneys and employees of corporations.

B. Despite plaintiffs' efforts to convey the contrary impression, the overwhelming weight of authority supports the decision of the Court of Appeals rejecting the "control group" test. Except for the few "control group" cases cited by plaintiffs, federal and state courts have held uniformly over the years that the privilege covers communications between an attorney for a corporation and its agents and employees, without any "control group" limitation. Wigmore, the Model Code of Evidence, the Uniform Rules, and other commentators are to the same effect. The one court of last resort which has recently considered the problem, the Supreme Court of California, rejected the "control group" test in favor of a rule similar to that adopted by the Seventh Circuit here (*D. I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal.2d 723, 36 Cal. Rptr. 468, 388 P.2d 700 (1964)).

In devising the "control group" test in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa., 1962), District Judge Kirkpatrick seemed to assume that because an individual client who consulted an attorney would have personal knowledge of the facts and also would be in a position to decide what to do on the basis of the attorney's advice, the privilege should apply only to attorneys' communications with corporate employees who have exactly the same characteristics. But seldom would the corporation's employees best able to inform the attorney of the relevant facts be the employees responsible for obtaining legal advice and for determining what action the corporation should take in light of it. Judge Kirkpatrick manifested no awareness that the effect of his theory would generally make the privilege unavailable for corporate clients, nor did

he give any reason why that result would be in the public interest. The few decisions which have followed Judge Kirkpatrick similarly offer no supporting rationale; they merely quote Judge Kirkpatrick (or each other) without discussion or explanation, and without recognition that the overwhelming weight of authority is to the contrary.

C. Plaintiffs' brief presents no arguments which justify either the "control group" test or disclosure of the communications at issue here. It completely disregards the public interests which are the basis of the attorney-client privilege, for corporate as well as other clients, and treats the privilege as a mere device for the suppression of evidence. But the privilege does not preclude a litigant from resorting to any source of information which would have been available if his adversary had not consulted an attorney.

Although plaintiffs' brief does not say so explicitly, its repeated references to the needs of plaintiffs in private antitrust cases and to the alleged peculiarities of "debriefing" memoranda imply that the privilege should be narrower in such situations. But none of the "control group" cases, including Judge Decker's opinion here, contains any such suggestion; each treated the "control group" test as a general rule of evidence. It is true that any litigant, here and in all other litigation, would be helped by disclosure of communications between his adversary and the adversary's attorney. But, as this Court held in rejecting a similar argument in *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), "framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory." As in *Hickman*, the problem presented here "far transcends the situation confronting this petitioner," and must be viewed "in light of the limitless situations to which the test espoused by plaintiffs would apply" (*ibid.*).

II

Although, of course, mandamus does not lie to correct all erroneous interlocutory rulings on questions of law, this Court has long recognized that in exceptional situations mandamus may properly issue "to confine an inferior court to a *lawful* exercise of its prescribed jurisdiction," and that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 25-26 (1943) (emphasis supplied); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 109-110, 112 n. (1964); *Ex parte Peru,* 318 U.S. 578, 584 (1943). Such power is "exercised only where a question of public importance is involved" (*Ex parte Peru,* at 585), and when no other adequate remedy is available.

As shown in Point I, the "control group" test, contrary to a previously uniform line of authority, substantially nullifies the attorney-client privilege for corporate clients, and thereby in large part contravenes the public purposes which the privilege serves. Unreversed, Judge Decker's ruling would generally inhibit free communications between corporate clients and their attorneys, at least in the Seventh Circuit.

The question raised here is thus clearly of extraordinary importance. The scope of the attorney-client privilege as applied to corporate clients is of more substantial consequence than the questions regarding the meaning of statutes or court rules which were raised in other cases where this Court held mandamus to be an appropriate remedy. For here the Bar, the entire business community, and a vast quantity of litigation in which they are engaged will be affected.

To allow writs to issue in the rare cases of this sort does not undermine the general policy against piecemeal appeals,

inasmuch as Congress reenacted both the final judgment and the all-writs statutes with knowledge that the latter had been construed to allow the courts a safety valve for dealing with exceptional situations.

Plaintiffs take the position that because Judge Decker's ruling followed a few decisions in other jurisdictions, the Court of Appeals could not issue the writ. But when a question of law is so important as to justify immediate determination by an appellate court, an authoritative determination of the correct rule of law for the area over which the appellate court has jurisdiction is no less necessary because some noncontrolling authorities elsewhere may support the trial court's view.

The opinion of the Court of Appeals reflects the care with which it approached the problem of whether mandamus should issue. Clearly that Court did not abuse its discretion in holding that the question whether the attorney-client privilege would remain applicable to most business transactions was of sufficiently exceptional importance to warrant issuance of the writ.

ARGUMENT

I. THE "CONTROL GROUP" TEST UNREASONABLY RESTRICTS THE SCOPE OF THE PROTECTION WHICH THE ATTORNEY-CLIENT PRIVILEGE AFFORDS TO COMMUNICATIONS BETWEEN CORPORATIONS AND THEIR ATTORNEYS.

The importance of the attorney-client privilege is recognized not only in the United States but generally in other countries (see *infra*, pp. 27-28, 36). Its acceptance is predicated not only upon the belief that the client is entitled to its protection, but also upon the belief that the public interest is served where a person is enabled, through

well-informed legal advice or service, to conform his actions to the standards imposed by the laws of his country. It recognizes the fact that, human nature being what it is, a person in need of legal advice or legal service will not speak as freely to his attorney if his statements are subject to subsequent disclosure as he will if he is assured that those statements will be held in confidence.

It also has been generally recognized, again both in this country and abroad, that if it is in the public interest that an individual be permitted to talk to his attorney in confidence, it is equally in the public interest that all of the many employees and other agents through whom a corporation acts (and by whose actions a corporation is bound) should be permitted to talk in confidence to counsel for the corporation about information which they have obtained in the course of their employment. If the attorney-client privilege serves a useful purpose in the case of an individual, then it does so even more in the case of a corporation which has numerous employees and agents through whose conduct it might possibly violate some law.

Moreover, the competent attorney, in talking to a client (or to the client's employees and agents), is not, as plaintiffs would have this Court believe, a mere recording machine. He is as much an inquisitor as he is a defender. His purpose is to uncover the area or areas in which the legality of his client's actions may be questioned, whether justifiably or unjustifiably. He cannot render sound legal advice or perform competent legal service unless he knows just what action his client has taken or is contemplating, and can consider all of the implications of such action, including the inferences which may be drawn therefrom.

The instant litigation involves a charge of price fixing, and nothing could serve better to illustrate the importance

of the attorney-client privilege, its necessary scope, and the role played by counsel in protecting the interest of the public as well as the interest of his client. An investigation by counsel of the pricing and distribution practices of his corporate client may (as in the instant case) be the result of a grand jury inquiry, or it may result from a complaint made to the corporation, or commencement of litigation (either a private suit or a suit brought by a governmental agency), or an internal review instituted by management. Whether or not the attorney becomes involved in litigation instituted against his corporate client (which is primarily a matter of private concern to the client), he will in virtually every instance be advising the corporation as to the proper course of conduct which it should pursue in the future—a matter of serious concern to the public.

If the pricing or distribution practices of a corporation are under scrutiny, the attorney's inquiry must usually be broad in scope, and must be defined by counsel rather than by the client. The client may have in mind only the sanctions against price fixing, but counsel may well conclude that possible monopolization, price discrimination and product tie-in are related issues which also have to be considered. If it is to be effective, the attorney's investigation must reach all employees or agents of the client, so that he may know the totality of what the client is doing and for what acts the client may be held responsible.

The investigation which counsel makes, protected as it is by the attorney-client privilege, conceals nothing from the client's opposing litigants, whether they are public or private. The same avenues of discovery are open to the client's adversary after the client (or his agent) has communicated with the attorney as were open prior thereto. The same documents remain available, and the same persons remain subject to questioning in the same manner. The attorney-

client privilege does no more than protect the confidentiality of communications between client and counsel, and prevent an adversary from using the client's attorney as a means of gathering information or developing theories of legal liability for use against the client.

Judge Decker's opinion would preclude application of the privilege to the communications specifically under consideration here, *not* because of any facts peculiar to this case, but rather because of his decision that in all corporate situations the privilege should apply only to communications between counsel and a very restricted number of corporate executives, to-wit, those who are responsible members of a corporation's management or "control group", who are seeking legal advice about corporate affairs, *and* who also are in a position to control the corporation's decisions regarding the issues about which legal advice is sought. Thus counsel could, in confidence, talk to and obtain information from the corporation's president but not a district sales manager, even though the latter might be the only agent of the corporation who has first-hand knowledge of the facts pertinent to the legal advice sought from, or the legal services to be rendered by, the attorney. Similarly, under the "control group" test counsel could, in confidence, advise the corporation's president about the pitfalls to be avoided in connection with the pricing of the corporation's products, but he could not so advise the district sales manager—the man on the firing line whose duties are such that he, rather than the corporation's president, would be more likely to involve the corporation in a charge of price discrimination or price fixing.*

* In the instant case, Judge Decker held that the privilege did not apply to attorneys' communications with "sales executives and regional managers [who] might have shaped the pricing policies concerning library editions" (App. 17).

Neither reason nor the authorities support such a wholly unjustifiable erosion of the attorney-client privilege, as defendants will demonstrate.

A. Adoption of the "Control Group" Test Would Contravene the Purposes Underlying the Attorney-Client Privilege.

This Court has recognized repeatedly since at least 1826 that the public interest demands maintenance of the attorney-client privilege, so that a client may communicate freely and confidentially with his attorney regarding the attorney's efforts to provide sound legal advice and competent legal service. In *Chirac* v. *Reinicker*, 11 Wheat. (24 U.S.) 280, 294 (1826), the Court, through Mr. Justice Story, declared that "it is indispensable for the purposes of private justice" that our legal system preserve the confidentiality of facts "communicated by client to counsel" in confidence.

Similarly, in *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915), this Court stated:

> "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance."

Despite plaintiffs' suggestion to the contrary (Pl. Br., p. 22, n. 20), it is clear that the attorney-client privilege applies to corporate clients as well as to individual clients. *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318 (1915), *supra*, which upheld a claim of privilege asserted by a corporation; *Bell* v. *Maryland*, 378 U.S. 226, 263 (1964)

(Appendix to concurring opinion of Justice Douglas); *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir. 1963), *cert. den.* 375 U.S. 929 (1963). And, as the Seventh Circuit recognized in its *Radiant Burners* opinion, "where a corporation is the client, it must act through its officers and its agents" (320 F.2d at 323).*

The Seventh Circuit's decision in *Radiant Burners* was in substance an application of the long-established rule that the privilege encompasses communications between an attorney and his client's agent. Wigmore summarized that rule as follows:

> "*Communications from the client's agent.* The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.
>
> "This of course includes communications through an *interpreter*, and also communications *through a messenger*, or any other *agent of transmission*, as well as communications *originating with the client's agent*

* Indeed, insofar as we can determine no court has ever questioned the applicability of the attorney-client privilege to communications between corporate clients and their attorneys, other than the District Court in the *Radiant Burners* case. The Seventh Circuit there, sitting *en banc*, reversed, pointing out that there is a "right and absolute necessity for confidential disclosure of information by a client to its attorney to gain the legal advice sought thereby", and went on to say:

> "A corporation is entitled to the same treatment as any other 'client'—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure; absent its waiver thereof." (320 F.2d at 324).

and made to the attorney." (8 Wigmore, *Evidence*, § 2317 (McNaughton's Rev. 1961).) (Emphasis in original.)

Accord, 3 Jones, *The Law of Evidence*, § 831, at 1560 (Gard. Rev. 1958).

The decision of the Court of Appeals followed this traditional doctrine in determining the scope of the protection which the attorney-client privilege affords to communications between corporations and their attorneys. The Court of Appeals recognized that the public interest considerations which are the basis of the attorney-client privilege are fully applicable to communications between a corporation's attorney and *any* employee of the corporation who is providing information which will enable the attorney to give legal advice to, or perform legal services for, the corporation on whose behalf the employee acted. And this is equally so whether or not the employee happens to be a member of the corporation's "control group", and whether the attorney gives legal advice to the corporation directly through that employee or through one of its other agents.

Judge Decker, however, ignored the established rule that the privilege encompasses communications between an attorney and his client's agent, and held that, for purposes of applying the attorney-client privilege, a corporation is a "client" only with respect to communications between its attorney and members of the corporation's "control group". Under this test, the confidentiality of the attorney's communications with the corporation's other employees would not be protected, even though their actions are binding on, and their knowledge is attributable to, the corporation.*

* The "control group" test as phrased may be read as limiting application of the privilege only to those situations where the communication relates to the giving or seeking of legal advice,

(continued on p. 19)

Adoption of the "control group" test would emasculate the attorney-client privilege for corporate clients, and thus would deprive the public of the benefits which it receives when a corporation's policies and procedures are based on well-informed legal advice.* In order for the privilege to be effective, it must—and does—apply both (1) to the confidential communications whereby the client (or his agent) transmits to the attorney the relevant information upon which the attorney's legal advice or legal services necessarily will be predicated, and (2) to the confidential communications whereby the attorney transmits legal advice to his client (or to the client's agent). Under the "control group" test, however, the benefits of the privilege would in most situations be unavailable to corporate clients.

(footnote continued from p. 18)

and not where it is incident to an attorney's efforts to obtain facts which he needs to perform legal services (such as preparing for, or conducting, a trial) for his corporate client. But the law is well settled that the attorney-client privilege is not so limited and encompasses communications induced by *any* aspect of the attorney-client relationship (including the performance of legal services), and not merely requests for legal advice. *E.g., Uniform Rules of Evidence*, Rule 26; *Model Code of Evidence*, Rule 210(b); *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950), quoted in *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir. 1962).

As far back as 1826, this Court through Mr. Justice Story (*Chirac* v. *Reinicker*, 11 Wheat. 280, 294, supra, p. 16), and again in *Alexander* v. *United States*, 138 U.S. 353, 358 in 1891, declared that "whatever facts, therefore, are communicated by a client to a counsel, *solely on account of that relation*, such counsel are not at liberty, even if they wish, to disclose • • •." (Emphasis supplied).

* Plaintiffs have made no effort to deny this, or to explain why the public interest factors which are the basis of the attorney-client privilege do not apply with equal force whatever the rank of the corporate employee with whom the corporation's attorney is communicating.

In the first place, no attorney can give sound legal advice to, or provide adequate legal service for, his client without full knowledge of the relevant facts. And in the case of a corporation the relevant facts frequently—and usually—are known directly *only* to agents and employees of the corporation who are *not* members of the corporation's "control group".

Secondly, the corporate agents and employees whose activities will be affected most directly by legal advice frequently are not members of the "control group" (*e.g.*, salesmen); the effectiveness of legal advice affecting the future conduct of such persons (and thus of the corporation) manifestly will be diluted if the corporation's attorney cannot communicate with them directly and on a confidential basis.

1. "There has been general agreement that the purpose of the [attorney-client] privilege is to facilitate the administration of justice by encouraging full disclosure by the client to its attorney" (*Radiant Burners*, 320 F.2d at 322).* Courts and commentators long have recognized that the attorney-client privilege operates to encourage "freedom of consultation" by removing "the apprehension of compelled disclosure by the legal advisers" (8 Wigmore, *Evidence*, § 2291 (McNaughton's Rev. 1961)).** The "control

* This Court recognized that principle in *Blackburn* v. *Crawfords*, 3 Wall. (70 U.S.) 175, 192-193 (1865), when it quoted approvingly the following statement from an early English case:

"'• • • If the [attorney-client] privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case.'"

** In *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888), this Court had declared that the attorney-client privilege

(continued on p. 21)

group" test, however, would *stimulate* that "apprehension", by imposing severe limitations on the ability of a corporation's attorney to obtain information from corporate agents and employees without fear of disclosure. Consequently, if that test becomes the law, there will no longer be "freedom of consultation" or full disclosure to corporate attorneys.

The inevitable result will be that a corporation's attorney frequently will be forced to operate in darkness, or at best in shadow. He naturally will be reluctant to elicit relevant information (which might materially affect his opinion and his advice) from those of his client's employees who have first-hand (rather than hearsay) knowledge thereof, lest he be compelled to disclose to an adversary the information which he has thus acquired—perhaps even as an unwilling witness against his own client. Surely if it is in the public interest that a client be permitted to communicate confidentially to his attorney the information upon which the attorney's legal service or legal advice is to be predicated, then it is in the public interest that a corporation's attorney be permitted to obtain that information on a confidential basis from those of his client's agents and employees who are best able to furnish it to him accurately and completely. To permit confidential disclosure only for top level corporate executives, who seldom will have direct, first-hand knowledge of the relevant facts, would be of little use.

(footnote continued from p. 20)

"• • • is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."

To the same effect, see American Law Institute, *Model Code of Evidence*, Comment a to Rule 210, pp. 146-147.

A corporation, of course, is liable for the conduct of all of its agents and employees acting within the scope of their employment, even though few of them have the power to determine what action the corporation should take on the basis of its lawyer's advice. The "control group" test, however, produces the incongruous, and indeed absurd, result that subordinate corporate employees for whose conduct the corporation is liable, and whose knowledge is imputed to the corporation, cannot speak confidentially when they wish to inform the corporation's attorney about acts which they performed or information which they obtained while acting on the corporation's behalf.

If a corporate employee could not communicate with the corporation's attorney confidentially, would he freely disclose *all* relevant facts within his knowledge, including potentially unfavorable facts regarding conduct for which he and his employer may be jointly liable? One commentator has expressed his concern in the following graphic language:

> "* * * I stumble in bewilderment over reasoning that holds *every* employee of a corporation to be *the* corporation for the purpose of charging it with his knowledge, while it holds *no* employee, however important, except those in ultimate command, to be the corporation for purposes of the lawyer-client privilege. I marvel at reasoning which uses discovery processes as a means of compelling a defendant through its attorneys to cross-examine its own employees in order to prepare a case for the plaintiff, or requires counsel for a client, threatened with suit or sued, to avoid finding out what the case is about for fear of being converted into an informer against his client. * * *" (Lasky, *Lawyer-Client Privilege*, 1963 Journal of the State Bar of California 427, 442 (emphasis in original).)

Yet another inherent flaw in this aspect of the "control group" test should be noted: as a corporation's legal problem becomes bigger and more serious, the protection afforded to the corporation by the attorney-client privilege becomes narrower and less available. For example, in the event of a major criminal antitrust case, it might be that only members of the corporation's board of directors would have sufficient authority over the corporation's course of action to qualify as members of the "control group". Consequently, because of the very significance of such litigation to the corporation, its attorney would be unable to communicate on a confidential basis with the corporate agents or employees whose alleged conduct gave rise to the litigation (including even high-ranking corporate executives); he would be able to communicate confidentially *only* with "control group" members, who might not have first-hand knowledge of any of the relevant information needed by the attorney.*

Under such circumstances, the attorney would be forced to select between two almost equally unattractive courses of action: (1) to give his client legal advice, or perform legal services, without knowledge of many of the relevant facts, or (2) to obtain all of the relevant facts by interrogating his client's employees, knowing that he might be compelled to testify against his client about the details and the results of that interrogation (including even the questions which he asked the employees, as well as their re-

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* The absurdity of such a result was recently pointed out by Dean Pye of the Duke University School of Law (Pye, *Fundamentals Of The Attorney-Client Privilege*, The Practical Lawyer, November, 1969, p. 15, at pp. 19-20):

"Thus, in a matter of overwhelming importance to a corporation, a department or division head might not be able to

(continued on p. 24)

sponses to those questions). But surely if the attorney-client privilege is to serve the same purposes and provide the same benefits whether the client is an individual or a corporation, then an attorney for a corporation should be permitted to obtain relevant facts on a confidential basis from whatever person within the corporation—be he officer, salesman or office boy—has first-hand knowledge of those facts.

2. An equally important aspect of the attorney-client privilege enables the attorney to communicate legal advice to his client on a confidential basis; see 8 Wigmore, *Evidence*, § 2320 (McNaughton's Rev. 1961). In order to be most effective, legal advice must be given directly to those persons whose conduct may be affected or influenced by that advice. The ability of a corporate attorney to give

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(footnote continued from p. 23)

speak for the corporation, while in cases where an employee is actually authorized to make a decision after consultation with counsel—as, for example, the head of a claims department dealing with a minor personal injury claim—a communication to an attorney concerning the matter would be privileged as to the corporation.

• • •

"It has been pointed out that the adoption of such a ['control group'] test may mean that outside counsel who engages in internal investigations as a part of a vigorous program of antitrust compliance may be developing evidence against a client when he exchanges communications with corporate agents who are not within the control group.

"Furthermore, the test seems to deny the privilege to the corporation when the communication is made by middle-management executives who may not qualify for inclusion in the control group, but who have responsibilities for making recommendations that are frequently ratified perfunctorily by higher management. See Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 367-69 (1967)."

legal advice to members of the corporation's "control group" is of little value to the corporation—or to the public—if that attorney cannot also present his advice, on a confidential basis, *directly* to those agents and employees of the corporation whose duties are such that they might, if uninformed, violate some complex statute or rule of law, and who thus are in a position to benefit the most from that advice.*

For example, the Robinson-Patman Act is an exceptionally complicated statute which virtually defies comprehension even by experienced antitrust lawyers. Violations of the Robinson-Patman Act, however, generally are committed by relatively low-ranking sales personnel. These are the corporate employees who are most in need of advice from counsel on the technicalities and intricacies of that law. This is the very group of employees, however, that would be precluded by the "control group" test from receiving such advice in confidence.

Consider the situation of the attorney who feels that certain aspects of the activities of his corporate client are probably within the law and defensible as such, but that resolution of the question is not entirely free from doubt. He may wish to recommend procedures which he believes would strengthen the corporation's position, and to explain those procedures to the corporate employees responsible for their implementation. One writer has described the dilemma which the attorney would face if he could not advise his corporate client on a confidential basis under such circumstances:

> "* * * Take the case of the corporate attorney asked to advise his client, a manufacturing corporation, on

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* Under the "control group" test, a member of a corporation's "control group" logically could not communicate the attorney's advice to a non-member without waiving the privilege.

the legality of a marketing arrangement with the corporation's distributors. In his role as advisor the lawyer may tell his client that the proposed arrangement raises several questions not heretofore resolved, and that there is a distinct likelihood that the arrangement could ultimately be held to violate a federal statute or perhaps a previously entered order or decree. The corporation may nonetheless decide to undertake the program, and this may be a perfectly proper decision. If the matter is subsequently litigated * * * the lawyer, as an advocate, will be responsible for presenting the strongest possible case for the legality of the contested arrangement. But what of his prior advice?

"If the privilege is unavailable to his client the lawyer will be aware of these possibilities when he originally is called upon to render advice. What is he to do? His rendition of accurate but undesired advice will compromise the position that, as the advocate, he may be called upon to defend. In these circumstances it would be unrealistic to discount the likelihood that the advocate will prevail over the advisor. The resultant caution with which the lawyer advises his client may mislead the client into thinking his proposed action is lawful when in fact it is not, or may not be. It may induce him to undertake a program from which he would have been dissuaded had he been clearly warned of the legal dangers. To the extent that the privilege encourages more forthright advice by lawyers it reduces the possibility of such misled clients and encourages adherence to the law." (Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L.Rev. 262, 269-270 (1963).)

The public, of course, has a vital interest in the deterrent effect of soundly based legal advice, particularly with respect to complex legal issues of the kind which frequently concern corporations; *e.g.*, compliance with the securities laws, the income tax laws and the antitrust laws. Enforcement of such statutes would be impossible without the suc-

cessful efforts of the Bar to explain, advise about and encourage voluntary compliance with the law.* Such free intercourse between attorney and corporate client should not be discouraged, as it would be if the protection afforded by the attorney-client privilege were restricted by adoption of the "control group" test.

It is a significant fact that the laws of other nations, so far as we have been able to ascertain from a representative sampling,** uniformly recognize the attorney-client privilege and apply it generally to an attorney's communications with any employee of his corporate client, regardless of the employee's rank. In those countries the confidentiality of a client's communications with an attorney is protected by statute, rule, or canon of ethics, which speak generally of "the client" without further definition or limitation of that term (except in Nationalist China, where application of the privilege to *any* attorney-client communication depends upon the discretion of the individual judge). The courts in England and Canada (as will be demonstrated *infra,* p. 36) have, like the courts in the United States, long applied the privilege to protect the confidentiality of an attorney's communications with any employee of his corporate client, without any restriction similar to the "control group" test. Inquiries were addressed to counsel in each of the other nations sampled, and in each instance:

1. Counsel expressed the opinion that in his country the privilege protects the confidentiality of an attor-

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* See, *e.g.,* Rifkind, *Access to Client and Adversary—A Plea,* 22 Record of New York City Bar Association 566, 567-568 (1967).

** We have received information from learned counsel concerning the laws of Australia, Belgium, China (Taiwan), France, Germany, Israel, Italy, Japan, Mexico, Netherlands, Sweden, Switzerland and Venezuela. English and Canadian cases are considered specifically *infra,* p. 36.

ney's communications with *any* employee of his corporate client, in exactly the same manner that it protects the confidentiality of an attorney's communications with an individual client; and

2. Counsel knew of no case or ruling questioning the applicability of the privilege to an attorney's communications with *any* employee of his corporate client.*

This understanding in common law, civil law, and other countries—as well as in the United States, as we show below—reflects a general belief that application of the attorney-client privilege to corporate employees (as well as to corporate executives) represents a salutary public policy. That policy should not be undermined by adoption of the "control group" test.

B. The Decision of the Court of Appeals Is In Accord With the Overwhelming Weight of Authority.

Despite plaintiffs' efforts to convey the contrary impression, the overwhelming weight of authority supports the decision of the Court of Appeals rejecting the "control group" test—a test unknown to any court until about eight years ago, when it was devised by Judge Kirkpatrick in one of the so-called "electrical equipment cases", *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa., 1962), petition for mandamus denied *sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), *cert. den.* 372 U.S. 943 (1963).

Indeed, for more than 100 years courts in this country and in England uniformly have applied the attorney-client privilege to protect the confidentiality of communications

* Copies of the letters and memoranda submitted by foreign counsel have been lodged with the Clerk of this Court and are available for examination by plaintiffs' counsel.

between a corporation's attorney and *all* of its employees, so long as those communications occurred in connection with the seeking of legal advice by, or the furnishing of legal services to, the corporation. Those decisions reflect the well-settled rule, described by Dean Wigmore (*supra*, pp. 17-18), that the attorney-client privilege protects communications between an agent and his principal's attorney. To the same effect, see 5 Jones, *Commentaries on Evidence* 4136 (1926), which states that the privilege unquestionably applies "where an agent of the client communicates directly with the attorney with regard to the transaction as to which the attorney is employed * * * *".* Similarly, the American Law Institute's *Model Code of Evidence* (1942), in Rule 210(c)(ii), and the Uniform Rules of Evidence (approved by the Commissioners on Uniform State Laws and the American Bar Association in 1953), in Rule 26(3), provide that the privilege covers communications between the lawyer and "a representative of the client" or "an authorized representative", without other limitation.

Numerous federal and state courts have applied this rule to permit an attorney for a corporation to communicate on a confidential basis with the corporation's employees, without any suggestion that the applicability of the privilege depends upon the duties and responsibilites of the employees in question, or upon whether they happen to be members of the corporation's "control group".

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* The most recent edition of that work is in substance the same (3 Jones, *The Law of Evidence*, § 831, at 1560 (Gard Rev. 1958)). See also *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 Northwestern U. L. Rev. 235, 241 (1961) ("It has long been recognized that the [attorney-client] privilege fully applies where the communication originated with an agent of the client").

Thus in *United States v. United Shoe Machinery Corporation*, 89 F.Supp. 357, 359 (D.Mass. 1950), Judge Wyzanski stated:

> "• • • in so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or *employee* of the [corporate] defendant in confidence and without the presence of third persons." (Emphasis supplied.)

Similarly, in *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 795 (D.Del. 1954), Chief Judge Leahy stated that the attorney-client privilege applies where

> "• • • the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either an opinion on law, or legal services or assistance in some legal proceeding.
>
> "In this case, the corporation is the client. 'Strangers' are those not affiliated with the corporation as *employees*, officers, directors, or 'outside counsel'. • • •" (Emphasis supplied.)

Judge Leahy did not suggest that "employee" was to have any meaning in this context other than its normal one; only *strangers to the corporation* were to be precluded from communicating with the corporation's attorney on a confidential basis.

Numerous other federal cases also have held that the attorney-client privilege protects the confidentiality of communications between a corporation's attorney and employees of the corporation, without any suggestion that the employees must be members of the corporation's "control group". See, for example, *Paper Converting Machine Co. v. F.M.C. Corporation*, 215 F.Supp. 249, 251 (E.D. Wisc.

1963) ("correspondence • • • from an employee of the [corporate] defendant to Mr. Hoffmeister [its attorney], seeking legal advice"); *United States v. American Radiator & Standard Sanitary Corp.*, 1958 Trade Cases ¶ 68,954 (W.D. Pa. 1958) ("compilation of data prepared by the [corporate] client for counsel for the ultimate purpose of gaining a legal opinion", and contained in a letter from the corporation's "Manager of Product Lines" to the corporation's attorney); *Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964) (attorneys who represented corporations and "certain employees and executives" thereof prepared memoranda summarizing the "debriefing" of those persons following their grand jury testimony, and the memoranda subsequently were exchanged among counsel for the different parties); *United States* v. *Aluminum Company of America*, 193 F.Supp. 251, 253 (N.D. N.Y. 1960) (communication between "non-legal personnel" of a corporation, disclosing legal advice previously given to the corporation); *United States* v. *Becton Dickinson & Company*, 212 F.Supp. 92, 93 (D.N.J. 1962) ("'writings between an attorney and an officer, director, employee, representative, or other attorney of the defendant corporation'").

Numerous state courts also have applied the attorney-client privilege to protect the confidentiality of communications between an agent acting on behalf of a corporate principal and the attorney for the corporation, without any suggestion that the privilege might be inapplicable where the communications involve employees of a corporation who are not members of its "control group". For example, in *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 Atl.2d 527, 528 (1954), the court said:

> "• • • Since a corporation can only act through its agent, it must necessarily follow that if the attorney-client privilege is to extend to corporations, as it does,

> Russell v. Second National Bank of Paterson, 136 N.J.L. 270, 55 A.2d 241 (E. & A. 1947), it must necessarily extend to confidential communications made by the agent of the corporation. * * *"

To the same effect, see *Beach* v. *Oil Transfer Corporation*, 23 N.Y. Misc. 47, 199 N.Y.S.2d 74, 77 (Sup. Ct., Kings County, 1960) ("communications had between the [corporate] defendant, by its officers, employees or agents, and the defendant's attorneys"); *Fire Association of Philadelphia* v. *Flemming*, 78 Ga. 733, 3 S.E. 420 (1887) (communications between an insurance company adjuster and the company's attorney); *Brink* v. *Multnomah County*, 244 Ore. 507, 356 P.2d 536, 540 (1960) (communications between defendant's attorney and an appraiser who had been employed by defendant to observe property in question); *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 220 Atl.2d 751, 755 (1966) ("appraisals and reports thereof confidentially made for the State at the request of an attorney from whom the State is seeking legal advice and confidentially communicated or turned over to the attorney").

Particularly pertinent here is *D. I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal.2d 723, 736-737, 36 Cal. Rptr. 468, 477, 388 P.2d 700, 709-710 (1964), where the "control group" test was rejected by the Supreme Court of California, the only court of last resort which has given full consideration to the problem. The California Supreme Court, after expressing its awareness of the conflicting federal decisions on the subject (see 388 P.2d at 706), set forth in detail the basic principles which govern the application of the attorney-client privilege to corporate clients. Its conclusion was substantially identical to that which the Seventh Circuit, citing *Chadbourne*, subsequently adopted in this case (App. 63). In view of the completeness with which the *Chadbourne* opinion covers the subject, we set forth the perti-

nent portion of that opinion in full (388 P.2d at 709-710):

"* * * If we apply to corporations the same reasoning as has been applied in regard to natural persons in reference to privilege, and if we adapt those rules to fit the corporate concept, certain principles emerge clear. These basic principles may be stated as follows:

"1. When the employee of a defendant corporation is also a defendant in his own right (or *is a person who may be charged with liability*), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;

"2. When such an employee is not a co-defendant (or person who may be charged with liability), his communication should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as distinct from the nonlitigant employee), and *the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's attorney;*

"3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege;

"4. Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;

"5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, *if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged;* • • • (Emphasis supplied.)•

Many other state courts also have held that the attorney-client privilege applies to preserve the confidentiality of a communication between a corporate employee (not a member of the corporation's "control group") and another employee or agent of the same corporation who in turn transmitted the communication directly to the corporation's attorney, in connection with securing of legal advice by the corporation. For example, in *Schmitt* v. *Emery*, 211 Minn.

• *Accord, Golminas* v. *Fred Teitelbaum Construction Co.*, 112 Ill. App.2d 445, 449-450, 251 N.E.2d 314, 318 (Ill. App. Ct. 1st Dist. 1969):

"• • • For example, the principle underlying the attorney-client privilege would demand that an employee's communications *should be privileged when* [as in the instant case] *the employee of the defendant corporation is also a defendant or is a person who may be charged with liability* and makes statements regarding facts with which he or his employer may be charged, which statements are given or delivered to the attorney who represents *either* or both of them." (Emphasis supplied.)

Contra, Day v. *Illinois Power Co.*, 50 Ill. App.2d 52, 199 N.E.2d 802 (Ill. App. Ct. 5th Dist. 1964).

547, 2 N.W.2d 413, 416 (1942) (involving an accident report which a bus driver submitted to his corporate employer at the request, and for the use, of the corporation's attorneys), the court said:

> "Because it is so often necessary for clients to communicate with their attorneys with the assistance or through the agency of others, as well as by their own personal action, *the privilege extends to a communication prepared by an agent or employee, whether it is transmitted directly to the attorney by the client or his agent or employee.* Of course the privilege is limited to the necessities of the situation. When a document is prepared by an agent or employee by direction of the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, *such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself.*" (Emphasis supplied.)

To the same effect, see *Jessup* v. *Superior Court,* 151 Cal. App. 102, 311 P.2d 177, 180, 182-183 (1957) (employees of City Department of Public Service); *Holm v. Superior Court,* 42 Cal.2d 500, 267 P.2d 1025 (1954) (bus driver); *Atlas Heating & Ventilating Co.* v. *Superior Court,* 208 Cal. App. 769, 25 Cal. Reptr. 532 (1962) (driver of corporate vehicle); *In re Hyde,* 149 Ohio 407, 79 N.E.2d 224, 227 (1948) (bus drivers); *Robertson* v. *Commonwealth,* 181 Va. 520, 25 S.E.2d 352, 360 (1943) (streetcar operator); *Wise* v. *Western Union Telegraph Co.,* 36 Del. 456, 178 Atl. 640, 642 (1935) (employee of telegraph company's local office); *Atlantic Coast Line R. Co.* v. *Williams,* 21 Ga. App. 453, 94 S.E. 584, 586 (1917) (train conductor); *Ex parte Schoepf,* 74 Ohio 1, 77 N.E. 276 (1906) (conductor and motorman of street railroad); *Davenport Co.* v. *Pennsylvania R. Co.,* 166 Pa. 480, 31 Atl. 245 (1895) (railroad's local freight agent).

The English courts have long followed the same principles. For example, in *Wilson* v. *Northampton and Banbury Junction Ry. Co.*, 14 Equity Cases 477 (1872), the court held that the attorney-client privilege protected the confidentiality of correspondence (1) between the company's attorneys and the former engineer of the company, and (2) between the company's attorneys and the "agents, subagents, engineers, surveyors, and directors of the company". See also *Birmingham and Midland Motor Omnibus Company, Limited* v. *London and North Western Railway Company*, 3 King's Bench Division 850, 851 (Court of Appeal, 1913) ("reports by porters and other agents and employees" of the defendant railroad corporation); *Seabrook* v. *British Transport Commission*, 2 All England Law Reports 15, 17 (Queen's Bench Division, 1959) ("reports made by the [corporate] defendants' officers and servants") and cases there cited. The basic principle that the attorney-client privilege protects communications "had through the medium of an agent, as far as it would extend to them if had with the principal", was enunciated in *Russell* v. *Jackson*, 68 Eng. Rep. 558-559 (1851) (involving the agent of an individual, rather than of a corporation). Canadian cases to the same effect are *Montreal Street Railway* v. *Feigleman* [Quebec K. B., 1913] 7 D.L.R. 6 (report prepared by motorman and conductor of streetcar for transmittal to the streetcar company's attorneys); *Stephenson* v. *E. D. & B. C. Railway* [Alberta S. Ct., 1926] 2 D.L.R. 680 (reports prepared by railroad claim agents, and "a report which all employees of the Defendant * * * make immediately after an accident [in part] for the information of the Company's Solicitor for his advice thereon").

Despite plaintiffs' efforts to suggest that the "control group" test has been widely adopted, they are able to cite very few decisions wherein that test has been applied. Moreover, none of the cited opinions contains a reasoned analysis justifying adoption of the "control group" test, and none

reflects an understanding of the far-reaching consequences which inevitably would result if such a severe restriction were imposed on the protection which the attorney-client privilege affords to communications between corporations and their attorneys.

As indicated *supra*, the "control group" test was devised by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483, *supra*, p. 28.* Significantly, that case (unlike the instant litigation) involved the applicability of the attorney-client privilege to communications between an employee of a corporation and a corporation's attorney who had expressly advised the employee that his interests might well conflict with the corporation's interests. According to Judge Kirkpatrick's opinion, the attorney told the employee that "although his [the employee's] disclosures were 'privileged', if it should turn out that they revealed a violation of written company policy directives, the lawyer would 'report that fact to management'" (210 F.Supp. at 484). Judge Kirkpatrick concluded that those statements by the attorney had the effect of "sharply differentiating the witness from 'the management', meaning, of course, the corporation" (at p. 486), and thereby effectively precluded "any possible claim that the communications were confidential" (at p. 484). Judge Kirkpatrick held, because of those statements by the attorney, that neither the attorney nor the employee regarded the communications as confidential, and also that both the attorney and the employee had understood that the employee was separate and distinct from the corporate entity, and had acted accordingly (see 210 F.Supp. at 484, 486).

On the basis of those factors (which are not present here),

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* Plaintiffs also cite (Pl. Br., p. 24, n. 21) two other rulings which Judge Kirkpatrick made in the course of the same litigation. Those, of course, do not add to the authority of his original decision.

Judge Kirkpatrick concluded that the attorney-client privilege did not protect the confidentiality of the communications between the employee and the corporation's attorney. Then, generalizing far beyond what was required by the case before him, he announced the novel "control group" test. In doing so, he expressly noted his disagreement with Judge Wyzanski's decision (in the *United Shoe Machinery* case, *supra*, p. 30) that the attorney-client privilege applies to communications between a corporation's attorney and the employees of the corporation, without restriction. After asking the correct preliminary question—whether it was "the corporation which is seeking the lawyer's advice"—Judge Kirkpatrick concluded that that question could be answered affirmatively only where the corporate employee who communicated with the lawyer "is in a position to control or * * * take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney" (210 F.Supp. at 485). Judge Kirkpatrick gave no further explanation, and did not manifest any awareness of the effect of excluding from the privilege communications between the corporation's attorney and employees who do not control the decisions as to what the corporation will do on the basis of the attorney's advice. He seemingly did not recognize that the "control group" test which he was initiating would in most situations render the privilege unavailable to corporations, nor did he suggest why such a result might be in the public interest.

An individual client who consults his attorney for legal advice, of course, necessarily has knowledge of the relevant facts regarding his own conduct, and also is in a position to receive the attorney's advice and decide what action he will then take. Under the "control group" test, however, a corporate client would be protected by the attorney-client privilege only with respect to communications between its attorney and an employee who possessed *all* of those characteristics of an individual client. But, as we have dem-

onstrated in greater detail in Section I A, *supra,* those corporate employees who have first-hand knowledge of the relevant facts, and who are best able to communicate those facts accurately to the corporation's attorney, usually are *not* the same corporate employees who are responsible for seeking and obtaining legal advice from the corporation's attorney, and for determining what action the corporation should take on the basis of that advice. The result is, as one writer stated succinctly, that Judge Kirkpatrick, by adopting the "control group" test, "proceeded to carve the attorney-corporate client privilege almost into oblivion." (Willis, *The Inroads of Pre-Trial Discovery on the Attorney-Client Privilege,* 1966 N.Y. State Bar Association Antitrust Law Symposium 109, 122.)

The other three reported federal decisions applying the "control group" test also do not offer any rationale in support of that test, and do not discuss the inevitable adverse effects of its adoption. In *Natta* v. *Hogan,* 392 F.2d 686, 692 (10th Cir., 1968) and *Garrison* v. *General Motors Corp.,* 213 F.Supp. 515, 518 (S.D. Cal., 1963), the courts simply quoted from Judge Kirkpatrick's *City of Philadelphia* decision as though it were conclusive. Moreover, in those cases and in *Honeywell, Inc.* v. *Piper Aircraft Corp.,* 1970 CCH Trade Cases ¶ 73, 122 (M.D. Pa., 1970), the only other reported "control group" case cited by plaintiffs, the courts did not refer to, and apparently were not aware of, any of the numerous contrary authorities (which were not discussed in the parties' briefs).*

The reason why those courts made no effort to justify the "control group" test is readily apparent from a review

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* The court in *Honeywell* expressly acknowledged (without criticism) the test for applying the attorney-client privilege to corporate clients which the Seventh Circuit had recently adopted in the instant case, but pointed out that the party claiming privilege in the case before it had not satisfied the requirements of the Seventh Circuit's test.

of the briefs submitted to them. In each instance the corporate party did not contest the validity of the "control group" test, or present any authorities or reasons demonstrating why that test is unsound; instead, the corporate party merely argued (unsuccessfully) that the particular communications in question were privileged because they involved members of the corporation's "control group". Thus in each of those cases the court was not asked to (and apparently did not) consider or determine whether the "control group" test was sound and reasonable as a matter of law. Those cases therefore are entitled to little weight as authority.*

Plaintiffs also rely (Pl. Br., pp. 24, 27, 28) on this Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). In *Hickman*, however, this Court specifically *declined* "to delineate the content and scope of the [attorney-client] privilege" (329 U.S. at 508), and held only that "the privilege does not extend to information which an attorney secures from a witness * * *" (329 U.S. at 508). Although some of the witnesses interviewed in *Hickman* were crew members employed by the attorney's client, there was no indication

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* In the reply brief which they filed in support of their petition for certiorari here, plaintiffs asserted (p. 1, n. 1) that the appellees in *Natta* (rather than the appellant corporation) "challenged the control group test". In *Natta*, however, the appellees sought to *narrow* the attorney-client privilege even beyond the limitations imposed by the "control group" test. They contended that the privilege does not apply to communications *from* an attorney to a client, and also that an especially broad exception to the attorney-client privilege should be recognized with respect to communications involving patent attorneys. It is clear, however, that none of the parties in *Natta* even suggested that, as the Seventh Circuit held in the instant case, the "control group" test unduly restricts the protection which the attorney-client privilege affords to communications between corporations and their attorneys.

that they had performed any duties on behalf of their employer in connection with the sinking of the vessel (329 U.S. at 498). Indeed, as survivors of the accident in question, they had presented claims of their own against the employer (No. 47, 1946 Term, Transcript of Record 70a). The opinion in *Hickman* does not suggest or even intimate that the Court meant to abrogate the privilege with respect to communications between a corporation's attorney and *all* corporate employees possessing relevant factual information who are not members of the corporation's "control group". Thus the decision of the Court of Appeals here is completely consistent with *Hickman*.

Plaintiffs also assert (Pl. Br., p. 11) that in *Rucker* v. *Wabash Railroad Co.*, 418 F.2d 146, 154 (7th Cir. 1969), "Another panel of the Seventh Circuit had previously indicated acceptance of a standard similar to the control group test." The *Rucker* opinion, however, expressly notes that "the statements [in question] do not appear to have been taken by the attorneys, but by investigators employed by the parties or their insurers" (418 F.2d at 154). Thus the defendant corporation in the *Rucker* case could not properly have claimed the protection afforded by the attorney-client privilege, and indeed its brief to the Court of Appeals did not even argue that the privilege was applicable, but only argued (unsuccessfully) that the statements in question constituted attorneys' work product. Moreover, the Seventh Circuit decided *Rucker* less than three months before it rejected the "control group" test in the instant case, and the opinion in *Rucker* was written by Judge Cummings, who was a member of the panel which entered the unanimous decision in the instant case.*

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* Other cases cited by plaintiffs are even less pertinent. For example, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44 (S.D.N.Y.

(continued on p. 42)

Plaintiffs also rely (Pl. Br., p. 25, n. 23) on the Preliminary Draft of the Proposed Rules of Evidence, prepared by the Advisory Committee on Rules of Evidence, which seems to adopt a modified version of the "control group" test (Rule 5-03(a)(3)) (Advisory Committee Note, p. 80). But that Draft, of course, is only the tentative version which it purports to be, made without the benefit of the comments and criticisms which the Advisory Committee itself has solicited. Thus it is not possible to predict with certainty what recommendation ultimately will be presented by that Committee (which, of course, now has before it the Seventh Circuit's decision in this case). Moreover, whatever final form that recommendation may take will have to be approved by the Standing Committee on Rules of Practice and Procedure, by the Judicial Conference, and by this Court before it can become effective. What Rule 5-03 will then provide on this issue is entirely conjectural.

C. Plaintiffs Present No Arguments Which Justify Adoption of the "Control Group" Test Or Disclosure of the Communications Which Are At Issue Here.

1. As we have demonstrated, the decision of the Court of Appeals preserving the confidentiality of the 17 attorneys' memoranda at issue here was predicated solely on

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(footnote continued from p. 41)

1951) (Pl. Br., p. 21, n. 19), involved only claims of work product protection, and did not present any issues regarding the attorney-client privilege. The court there emphasized the fact that the record did not show that the witness statements in question were taken by the *defendant's attorney*, and concluded that there apparently was not "any basic professional relationship" between the defendant and the individual who procured the witness statements, even though that individual happened to be an attorney (14 F.R.D. at 467).

the conclusion that the "control group" test is unsound as a matter of law. Plaintiffs' brief, however, makes very little effort to defend that test, or to present any rationale which would warrant adoption of such a restrictive standard by this Court.

Although plaintiffs assert (Pl. Br., p. 23) that "the control group test strikes an appropriate balance between the interests sought to be protected by the attorney-corporate client privilege and the legitimate need of litigants to secure access to the facts," their brief makes no effort to balance the competing considerations, or to explain how the privilege impedes access to any facts. Indeed, plaintiffs merely state, contrary to what is obviously so, that the "control group" test "does not interfere with the ability of corporate attorneys to give legal advice to the corporation and its proper representatives in confidence" (Pl. Br., p. 37). But the "control group" test unquestionably narrows the number of corporate employees who may receive legal advice in confidence, and it also impairs the soundness of the legal advice given to a corporation by preventing the lawyer from communicating confidentially with non-"control group" members in order to obtain the relevant information upon which his advice may have to be predicated. In addition, plaintiffs disregard the fact that the attorney-client privilege encompasses not only the giving of legal advice, but also communications which are incident to the attorney's performance of legal services, including the handling of litigation (see *supra*, pp. 18-19 n.).

Plaintiffs also assert (Pl. Br., pp. 27-28) that an employee who is not a member of the "control group" is no different from an outside witness who has knowledge of relevant facts. But a corporate employee who obtains information in the course of his corporate duties, and for whose conduct the corporation is liable, clearly is an agent

of the corporate client to whom the privilege always has been held applicable (except in the few "control group" cases). Wigmore's recognition that the privilege covers an attorney's communications with his client's agents (*supra*, pp. 17-18) demonstrates that its application to corporate employees is fully consistent with the "four fundamental conditions" which Wigmore deemed a prerequisite to the existence of any privilege (as quoted at Pl. Br., pp. 22-23, from 8 Wigmore § 2285)—as it clearly is.

2. Plaintiffs' brief attempts to support Judge Decker's conclusion by challenging the wisdom of affording corporations the protection of the attorney-client privilege, which plaintiffs characterize as "an imposing barrier to the ascertainment of facts" and a means of "hobbling the judicial process" (Pl. Br., pp. 29, 35). But none of the "control group" cases, including Judge Decker's opinion here, espouses any such position, and, as we have shown *supra*, pp. 14-15, the privilege does not suppress the truth. It does not preclude a litigant from resorting to any source of information which would have been available if his adversary had not consulted an attorney. The practical result of holding the privilege inapplicable (where it had been thought to apply) would merely be to create another possible source of information—the lawyer—which source might not exist but for the privilege, since the client might not have communicated that information to the attorney if both had not believed that the privilege would preserve the confidentiality of their communication.

Furthermore, as we have demonstrated in Section I A, *supra*, the Anglo-American legal system has recognized consistently, for several hundred years, that the attorney-client privilege creates public benefits which exceed whatever inconvenience it may impose upon particular litigants. See American Law Institute, *Model Code of Evidence*

(1942), Comment to Rule 210, p. 147; 8 Wigmore, *Evidence* § 2291 (McNaughton's Rev. 1961).* If it is in the public interest to encourage full and free disclosure between client and attorney, such disclosure should be encouraged for corporate clients as well as for individuals.

3. Plaintiffs' repeated references to the needs of plaintiffs in private antitrust cases and to the alleged peculiarities of "debriefing" memoranda appear to imply that the privilege should be narrower in such situations. But none of the "control group" cases, including Judge Decker's opinion here, makes any such suggestion. Each of them treated the test as a general rule of evidence; indeed, three of the other four reported federal control group cases—*Natta*, *Garrison* and *Honeywell*, discussed at pp. 39-40, *supra* —were not antitrust cases and did not involve "debriefing memoranda".

Plaintiffs' intimation that the attorney-client privilege should be applied differently in private antitrust suits than in other types of litigation disregards the fundamental salutary purpose of the privilege—to encourage full and candid disclosure between clients and their attorneys, so that the latter may provide sound legal advice and compe-

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* Plaintiffs have cited only a single modern critic of the privilege, Professor Morgan; they say (Pl. Br., p. 36) that "no answer has ever been documented to Professor Morgan's challenge" to the basic validity of the attorney-client privilege. But the "challenge" in question appeared in Professor Morgan's foreword to the *Model Code of Evidence*, which (despite his views) expressly recognized that "the continued existence of the [attorney-client] privilege is justified on grounds of social policy." American Law Institute, *Model Code of Evidence* (1942), Comment to Rule 210, p. 147. Professor Morgan was unsuccessful in his efforts to convince courts, commentators and the Bar that the public interest would be served by abolition of the privilege.

tent legal service. If the privilege is to accomplish that purpose, both client and attorney must be able to determine, *at the time their communication occurs*, that the privilege is applicable, without fear that confidentiality will be dependent upon the kind of litigation in which disclosure might be sought in the future.

Plaintiffs' suggestion that the privilege should not apply to attorneys' "debriefing" interviews with grand jury witnesses, because in such situations attorneys are "little more than scriveners" (Pl. Br., p. 21, n. 19), has no basis either in fact or in law. As a matter of law the privilege covers attorney-client communications whether the client or the attorney is the scrivener (or even if no written record of the communication is made). A "debriefing" communication is in this respect the same as any other communication whereby a client (or the client's agent) attempts to inform an attorney of relevant facts upon which the attorney will predicate legal advice or legal services.*

Nothing in the record even suggests that the still-sealed attorneys' memoranda at issue here are "simple witness narratives" (Pl. Br., p. 17), or merely reiterate what the witnesses told the grand jury. Plaintiffs' brief itself acknowledges (pp. 18, 32) that "debriefing" communications frequently include relevant information in addition to a description of the grand jury testimony itself, and this would normally be the case (see *e.g.*, App. 97). Even if a particular "debriefing" communication related only to the grand jury testimony, however, the attorney needs such information in order to prepare for possible subsequent liti-

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* Whether or not an attorney's memorandum expressly incorporates the attorney's thought processes is relevant only in determining the applicability of the work product doctrine, which affords qualified, not absolute, protection to documents wherein an attorney describes his interviews with outside, non-client witnesses.

gation and to advise the client how to act in compliance with law. Clearly he will be better able to do this if the client and the client's agents discuss their grand jury appearances with the freedom and candor which can exist only if their communications will be kept confidential.

4. Plaintiffs' statements that disclosure of the attorneys' memoranda will be helpful to plaintiffs in these and similar law suits are, of course, true. Any litigant could appropriately argue that his trial preparation would be greatly facilitated by disclosure of confidential communications between his adversary and the adversary's attorney, but no court has suspended the attorney-client privilege on such grounds. This Court rejected a similar argument in *Hickman* v. *Taylor*, 329 U.S. at 507, admonishing that "framing the problem [of requested disclosure of attorneys' work product] in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory." As in *Hickman*, the problem here "far transcends the situation confronting this petitioner" and must be viewed "in light of the limitless situations" to which the test espoused by plaintiffs would apply (329 U.S. at 507).

5. The inherent weakness of plaintiffs' position is demonstrated by their repeated reliance upon statements made by or regarding other witnesses, many of which statements are not in the record or properly before this Court.

Thus plaintiffs refer repeatedly to Judge Decker's "findings of particularized need for release of the debriefing statements in this case" (Pl. Br., p. 31), and quote his comments about the evasive and forgetful deposition testimony of certain witnesses (Pl. Br., pp. 4-5, 31-32 n. 29). The "findings" (App. 19-20), however, related *only* to defendants' claims under the *work product doctrine*, and had no bearing on Judge Decker's decision regarding the

attorney-client privilege. Furthermore, the quoted statements by Judge Decker with respect to evasive deposition testimony related to motions for disclosure of the grand jury testimony of about 20 individuals, most of whom are not among the 17 persons whose communications with attorneys are at issue here.* Particularly improper in this respect is plaintiffs' reliance (Pl. Br., pp. 31-32, n. 29) on quotations from Judge Decker's opinion of January 16, 1970 (three months after the ruling here involved and not contained in the present record), which held that eight individuals had been evasive and recalcitrant at their depositions; not one of those eight individuals is the subject of any of the attorneys' memoranda now before this Court.

Similarly, plaintiffs quote at length (pp. 32-35) from four attorneys' memoranda summarizing interviews with Clarence Roland and Si Goldman, neither of whom is the subject of any of the 17 memoranda involved here. Furthermore, these four memoranda were under seal at the time of Judge Decker's ruling, and three remained under seal until after the decision of the Court of Appeals.** A copy of one of the two Roland memoranda was attached to the answer which plaintiffs submitted to the Court of Appeals in response to the petition for mandamus, but it was not

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* Disclosure of attorneys' communications with those individuals who were evasive at their depositions obviously is not necessary to show the substance of their grand jury testimony, inasmuch as their grand jury transcripts (which have already been turned over to plaintiffs) obviously are the best evidence of what that testimony was.

** Certain of the attorneys' memoranda which were at issue before Judge Decker were unsealed after the Court of Appeals denied mandamus with respect to Judge Decker's order directing their disclosure.

properly a part of the record in the Court of Appeals because it remained sealed at the time Judge Decker rendered his October 7, 1969 decision. It is because the Roland memoranda were not read by the District Court (App. 14, n. 11) and were not properly before the Court of Appeals that respondents are seeking to prevent their inclusion in the Appendix and in the record before this Court.* (Plaintiffs have made no effort to have the two Goldman memoranda which they quote included in the Appendix or in the record.)

In any event, there is no basis for plaintiffs' assertion that the contents of the four unprivileged memoranda relating to Messrs. Roland and Goldman exemplify the contents of the 17 *other* attorney-client communications which the Court of Appeals held privileged, and which plaintiffs have never seen. The Seventh Circuit, in refusing a request for disclosure of attorneys' work product, commented on the impropriety of such an argument in *Hauger* v. *Chicago, Rock Island & Pacific R. Co.*, 216 F.2d 501, 505-506 (7th Cir. 1954):

> "* * * In substance plaintiff argues that, inasmuch as it was revealed at the taking of depositions that three of the witnesses had given statements to Rock Island which were impeaching of their testimony on the depositions, a court would conclude that the testimony of the six witnesses whose statements are now being discussed also would be impeached by their respective statements, if produced for inspection. *This is equivalent to saying that where it was shown that three witnesses out of a group of nine lied, the other six must have also lied.* Obviously there is no reasonable basis for such a deduction. *If there is any presumption it is in favor of veracity rather than perjury.* * * *" (Emphasis supplied.)

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* This Court has reserved decision as to whether the Roland memoranda may be included in the Appendix and in the record.

6. Plaintiff's suggestion that the attorneys' memoranda, or the information contained therein, were exchanged among counsel for various defendants (Pl. Br., pp. 19, 26) is not supported by the record, and was not a basis for Judge Decker's ruling or even mentioned in his opinion. In any event, such an exchange would not have waived the privilege, as the Ninth Circuit squarely held in *Continental Oil Co.* v. *United States,* 330 F.2d 347 (9th Cir. 1964), a case which involved attorneys' "debriefing" memoranda quite similar to those which are involved here.*

Plaintiffs also contend that the attorney-client privilege should not be applicable here because the attorneys' affidavits and factual statements did not indicate that any of the corporate employees with whom they conferred "had sought or received legal advice", or "expected or requested that his disclosure be kept confidential" (Pl. Br., pp. 20-21).** But here we are concerned with the corporation's privilege, not the employee's. Because in each instance the corporation, not the individual employee, was the client, the

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* There is also nothing in the record or in Judge Decker's opinion to support plaintiffs' suggestion (Pl. Br., p. 19) that the privilege may have been waived as to a few of the memoranda because of the general rule that materials "used to refresh the recollection of a witness" must be made available to opposing counsel. That rule applies only to material used to refresh the recollection of a witness *while he is testifying,* rather than (as here) in preparation for his testimony—a fact which is demonstrated by *National Dairy Products Corp.* v. *United States,* 384 F.2d 457 (8th Cir. 1967), *cert. den.* 390 U. S. 957 (1968), the only case cited by plaintiffs on this point (Pl. Br., p. 19, n. 17).

** Although plaintiffs state expressly that Judge Decker found "that the grand jury witnesses neither sought nor received legal advice relating to corporate affairs during their debriefing interviews" (Pl. Br., p. 20), a careful perusal of Judge Decker's opinion fails to disclose such a statement.

determinative facts are (1) that the communications occurred in connection with the furnishing of legal service to the *corporation*, and (2) that the *corporation* contemplated that the employee's communications with the corporation's attorney would be confidential. Consequently, the absence of evidence regarding the employee's intentions in that respect is irrelevant.

Finally, plaintiffs' argument that the memoranda should be disclosed because they are likely to contain evidence prejudicial to defendants provides no sound basis for holding the privilege inapplicable. The attorney-client privilege applies fully and completely even to a client's admission of guilt to his attorney (no matter how horrible the crime of which he is guilty). 8 Wigmore, *Evidence*, § 2298 (McNaughton's Rev. 1961). A client must be permitted to communicate confidentially with his attorney, particularly as to such matters, if the privilege is to benefit the public interest by achieving its intended purpose.

II. THE GRANTING OF MANDAMUS WAS AN APPROPRIATE EXERCISE OF DISCRETION BY THE COURT OF APPEALS.

It is of course clear that not every wrongful exercise of discretion or every incorrect ruling on a legal question justifies the use of mandamus as a means of obtaining review of interlocutory orders. This does not mean, however, that there is a rigid rule against the use of the writ to review any such order. This Court has long recognized that in exceptional situations mandamus may properly issue "to confine an inferior court to a *lawful* exercise of its prescribed jurisdiction * * *." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109-110 (1964); *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953); *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 245 (1964); *Will* v. *United States*, 389

U.S. 90, 95 (1967), all quoting from *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943) (emphasis supplied). And the decisions further establish that whether a writ should issue is a discretionary matter. "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. * * *" *Ex parte Peru*, 318 U.S. 578, 584 (1943); *Roche* v. *Evaporated Milk Association, supra*, at 25; *Schlagenhauf, supra*, at p. 112 n.; *Ex parte United States*, 287 U.S. 241, 248 (1932). See also 6 Moore, *Federal Practice*, § 54.10[4], pp. 87-88.

"The courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction' * * *." *Will* v. *United States, supra.* The decisions establish that the writ may issue to correct errors of law on matters of exceptional importance where no other adequate remedy is available. Indeed, this Court has held that mandamus, on occasion, may issue even to correct a "clear abuse of discretion". *Schlagenhauf, supra*, at p. 111; *Bankers Life, supra*, at p. 383; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957).

Of course, as this Court also asserted in the *Will* case (p. 98 n.), the references in earlier decisions to "abuse of discretion" and "want of power" were not meant to result in review of interlocutory orders "on the *mere* ground that they may be erroneous" (emphasis supplied). More than that is required, and most interlocutory orders, erroneous or not, clearly remain unreviewable.

In determining whether this Court itself should issue a writ to a District Court, without intermediate review by a Court of Appeals—and the test should be more stringent in such cases than where the writ is sought from a Court of Appeals—this Court has asserted that "such power will be exercised only where a question of public importance is

involved * * * ." *Ex parte Peru,* 318 U.S. 578, 585, 586 (1943). When such a question is raised and there is reason to believe that the District Court's decision is *not* a lawful exercise of its authority, and when no other effective remedy is available, the writ may appropriately issue.

There can be no doubt as to the extraordinary importance of the question presented by Judge Decker's decision adopting the "control group" test. For, as we have shown in Section I A, *supra,* adoption of that test would nullify in substantial part the attorney-client privilege for corporate clients. So to destroy the confidentiality of the relationship between an attorney and his corporate clients (and their employees)—and we see no reason why the rationale of Judge Decker's decision does not extend equally to unincorporated business entities as well, except when only a single individual is involved—would substantially alter the manner in which law is practiced, to the detriment of the public, as well as the private, interests which the attorney-client privilege is designed to protect.

Rulings on evidence questions, particularly those which occur in the course of discovery, seldom reach the appellate courts through appeals from final judgments. Accordingly, if the writ had not been granted, Judge Decker's ruling would have operated as a warning to all careful counsel, particularly in the Seventh Circuit, thereby inhibiting free communication between corporate clients and their attorneys. Preparation for a vast amount of litigation, as well as factual inquiries in many contexts which might result in litigation, would have been affected.

An additional factor supports the granting of the writ in multi-district cases such as these. In this litigation Judge Decker is acting as pre-trial judge, pursuant to 28 U.S.C. § 1407, for over 40 cases filed in six different circuits and

in one district in the Seventh Circuit in addition to the Northern District of Illinois. Each of these cases, if not settled,* will be tried and appealable in the district and circuit in which it was initially filed. The possibility of conflicting rulings, and the need for retrials if *any* Court of Appeals were to disagree with Judge Decker, are manifest. In such circumstances, at least where there is substantial doubt as to correctness of a trial judge's ruling on an important question of law, sound judicial administration requires that the matter be determined authoritatively before the cases are sent back to the originating districts for trial. Moreover, since other discovery is still pending in these cases and trials are a long time away, the time required for the mandamus proceeding will not delay the ultimate disposition of the litigation.

The above considerations demonstrate that the question presented here is of infinitely greater importance than the issues in other cases where this Court has held mandamus to be appropriate. For here the Bar, the entire business community, and a large volume of litigation in which they are engaged will be affected.

In a number of cases this Court and the courts of appeals have granted mandamus to correct misinterpretations of statutes or rules when the circumstances made prompt correction of the error exceptionally important. *E.g.*, whether Civil Rule 35 permits a court to order a physical examination of a defendant as well as of a plaintiff (*Schlagenhauf, supra*); when masters can properly be used (*LaBuy* v. *Howes Leather Co. supra*); the "appropriate criteria" to be considered in applying 28 U.S.C. §. 1404(a) (*Platt, supra*); whether discovery depositions are proper in admi-

* A number have been settled since the Court of Appeals entered its decision.

ralty cases (*Miner* v. *Atlass*, 363 U.S. 641 (1960)); whether the attorney-client privilege protecting "debriefing" memoranda (similar to those here) had been waived by an exchange of the memoranda between counsel for different defendants (*Continental Oil Co.* v. *United States*, 330 F.2d 347, 349 (9th Cir. 1964), *supra*, pp. 31, 50); and whether disclosure of a trade secret could lawfully be compelled (*Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9th Cir. 1961)). A number of the above cases held mandamus to be an appropriate remedy to deal with important legal problems arising during the course of discovery. *Schlagenhauf, Atlass, Continental Oil, Hartley Pen*, all *supra*.

There is no less reason for granting mandamus when a trial court threatens to emasculate a common law rule* which was universally accepted until 1962, and which only a handful of courts have failed to follow since that date. The impact of the "control group" test upon the public interest in enabling attorneys to provide legal service on the basis of candid disclosure of the relevant facts is far more pervasive and significant than the impact of the issues which were deemed sufficient to warrant the use of mandamus in the above cases.

Nor was any other effective remedy available to defendants with respect to the trial court's ruling. The trial court had barred other avenues of appellate relief by refusing certification under 28 U.S.C. § 1292(b), and by refusing requests by certain defense counsel (*e.g.*, App. 98) that the attorneys' memoranda be returned to them (which would

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* That common law and court rules may be similar in nature and importance is shown by the fact that the common law rules of evidence probably will soon become the subject of federal court rules.

have enabled counsel to challenge the propriety of the trial court's order through contempt proceedings, if they had chosen to do so). Thus if the Court of Appeals had not issued its writ of mandamus, the privileged documents would have been turned over to the plaintiffs immediately, and the privilege would have been lost irretrievably. As a practical matter, such an error cannot be rectified years after the confidential information has been disclosed, even if a reviewing court finally determines, after trial, that the documents were privileged.

Plaintiffs point to statements in the *Will* and *Schlagenhauf* opinions, *inter alia*, which refer to "usurpation of power" by the trial judge as a prerequisite to the issuance of the writ. But the cases in which mandamus has been granted show that that phrase does not connote anything like an arbitrary or bad faith assertion of non-existent power by the trial court. Nothing like that was present in any of the cases. Thus, in *Ex parte Peru*, 318 U.S. at 588, in which this Court issued its writ directly to the District Court, Chief Justice Stone stated that "the question which we must decide is not whether there was jurisdiction in the district court * * * but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law." In the *Platt*, *Schlagenhauf*, and *Atlass* cases, there was also nothing more than a good faith misinterpretation of a rule or statute, no different in substance from the misinterpretation of a rule of evidence which is involved here. In each instance, although the trial court had jurisdiction over the controversy, it lacked "power", in one sense of that term, to enter an order contrary to what the Court of Appeals determined to be the correct principle of law.

To allow writs to issue in the rare cases of this sort does not undermine the general policy against piecemeal appeals. Congress reincorporated both the final judgment rule and the All-Writs section in the Judicial Code of 1948,* long after the latter had been construed (as in the *Peru* case) to allow the courts a safety valve for dealing with exceptional situations more speedily than the final judgment rule alone would permit. It therefore cannot be said that the action of Congress is inconsistent with such an interpretation of the two statutory provisions together.

Nor did Congress repeal the All-Writs statute, or express any dissatisfaction with the way that statute had been construed, when it created another exception to the finality principle by passing 28 U.S.C. § 1292(b), 72 Stat. 1770, in 1958. That section allows an interlocutory appeal only when both a district court and a court of appeals concur in finding that the law is in doubt and that immediate appeal will expedite the litigation. This is a much broader test than the courts have applied in issuing writs of mandamus, for it is not restricted to "exceptional circumstances". On the other hand, Section 1292(b) does not apply in situations where a district court refuses to certify a question which from the public as well as the private standpoint demands immediate decision. The cases in which writs have been granted attest that there are such situations, and that a trial judge should not have *conclusive* authority to determine whether an immediate appeal may be taken from his own ruling. This Court's repeated references to the writs as *discretionary* remedies is a recognition that there is a need for flexibility in this area.

In light of the tests which this Court has prescribed,

* See 28 U.S.C. §§ 1291, 1651, 62 Stat. 929, 944 (1948).

there is no reason to fear that the courts of appeals will abuse their discretionary power to deal with exceptional situations. The care with which the Court of Appeals here approached this problem is reflected in its opinion, which refused mandamus with respect to other erroneous portions of Judge Decker's disclosure order. See pp. 6-7 n., *supra*. In determining that the crippling "control group" limitation upon the privilege was unsound as a matter of law, the Court of Appeals clearly was acting within the scope of its discretionary power—and there is no occasion or need to second-guess it.

Plaintiffs take the position that because Judge Decker's ruling followed other authorities in other circuits, the Court of Appeals could not issue the writ. In part, this argument rests on the erroneous assumption that Judge Decker was following "an uncontradicted line of federal cases" and "all relevant federal law" (Pl. Br., pp. 10-11). As we have shown in Section I-B, *supra*, this assumes that the law on this subject sprang full-blown from Judge Kirkpatrick's brow in 1962, and ignores the large body of authorities (including many federal and state cases, Wigmore, the Model Code and the Uniform Rules, discussed *supra*, pp. 17-18, 28-35) which are directly contrary to, and inconsistent with, the "control group" test. The statements of the Tenth Circuit in *Natta* and of the California District Court in *Garrison*, *supra*, pp. 39-40, where the soundness of the "control group" test was not raised or argued, plainly did not comprise "all" of the relevant federal law on the point.

Nor is a trial court ruling immune from mandamus because cases in some other jurisdictions may be found to support it. When a question of law is so important as to justify immediate determination by an appellate court, an authoritative determination of the correct rule of law for the area over which the appellate court has jurisdiction is

no less necessary because some non-controlling authorities may support the trial court's view. With decisions elsewhere seemingly in conflict, there was all the more reason for the Court of Appeals here to attempt to eliminate the conflict regarding a matter of such great importance, at least for its circuit, without leaving the issue in doubt for the years which might elapse before the issue was raised in an appeal from a final judgment.* Thus the mere fact that Judge Decker relied in complete good faith on authorities elsewhere—which gave insufficient reason (or none at all) for their conclusions—does not preclude issuance of the writ.

Plaintiffs argue that the remedial inadequacy of appeal after disclosure of confidential material would be the same for all interlocutory denials of a privilege, and that therefore the decision below invites widespread use of mandamus to review interlocutory rulings. This ignores the basic premise on which the Court of Appeals' decision rested—that "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice" (App. 63). Only when an interlocutory decision presents an issue of law of great importance to the parties and the public is issuance of the writ warranted.

That is what this Court's mandamus decisions establish. The Court of Appeals here did not abuse *its* discretion in holding that the question whether the attorney-client privilege would continue to be applicable to most business transactions was of sufficiently exceptional importance to warrant issuance of the writ.

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* If the actions are settled before trial, or if defendants prevail on the merits, the Seventh Circuit would never have had an opportunity to review Judge Decker's decision on this issue.

CONCLUSION

For the above reasons, the judgment of the Court of Appeals should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 113

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, ET AL.,
Petitioners,

vs.

HARPER & ROW, PUBLISHERS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE OHIO STATE BAR ASSOCIATION FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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In the Supreme Court of the United States

October Term, 1970

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vs.

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Respondents.

MOTION OF THE OHIO STATE BAR ASSOCIATION FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

The Ohio State Bar Association (the Association) respectfully moves for leave to join in the brief of the American Bar Association as *amicus curiae*. Respondents and *amicus curiae* have consented to the addition; the consent of the Petitioners was requested but has been withheld.

The Association represents the interests of the Bar in the nation's sixth largest state. The Association is concerned that approval of the "control group test" adopted by the District Court but rejected by the Court of Appeals.

would fundamentally alter the nature of the attorney-client relationship to the detriment of both the profession and the public. This is true whether the attorney is gathering information to conduct litigation, to counsel a client on a specific matter, or simply to learn more of his client's affairs so as better to advise him in the future. The need for a clear and liberal standard, which the "control group test" is not, is particularly acute in the general counseling context where the interests of justice are best served by a frank and open relationship between lawyer and client. In Ohio, state law would clearly prohibit the discovery in question here. Ohio Rev. Code §2317.021. Yet the Ohio policy of promoting open and confidential relationships between lawyer and client may be thwarted if the District Court's rule is adopted as the standard for the federal courts: a client and lawyer talking generally do not know whether discovery might be sought in state or federal forum.

Because the significance of the issues raised extends far beyond the facts here at issue and will have a heavy impact on the daily practice of law, the Association feels that direct presentation of the views of the legal profession will aid the Court in focusing on the continuing need for a broad definition of the attorney-client privilege. At the same time, the Association recognizes that a concise presentation aids both the Court and the parties. Therefore it desires officially to register its agreement with the positions expressed in the brief of the American Bar Association as *amicus curiae* rather than to file an independent brief. While this procedure is not frequently employed, the Court has recognized its usefulness in the past, *Federal Power Commission v. Southern California Edison Co.*, 375 U.S. 919 (1963), and the Association feels that the granting of its motion will be equally beneficial in this case.

WHEREFORE, the Association prays that it be granted leave to join in the brief of the American Bar Association as *amicus curiae*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF MINNESOTA STATE BAR ASSOCIATION FOR LEAVE TO APPEAR AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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July 31, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 113

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, ET AL,
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF MINNESOTA STATE BAR ASSOCIATION FOR LEAVE TO APPEAR AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The Minnesota State Bar Association respectfully moves under paragraph 3 of Rule 42 of the Supreme Court Rules for leave to appear herein *amicus curiae* in support of the position of the respondents in this case, and for leave to adopt as its own the brief being filed herein by the American Bar Association. Written consent of all the parties to the case has not been sought because the parties are too numerous for this movant to

consult in the time available to it. Furthermore, the American Bar Association was unable to obtain consent of the attorneys for petitioners for its filing of a brief *amicus curiae* herein.

Because a large percentage of the business conducted in Minnesota and a large percentage of the business handled by Minnesota lawyers result from the activities of corporations, any decision by this Court relating to the attorney-client privilege as applied to corporate agents and employees will be of the greatest moment, not only to corporations doing business in Minnesota but also to a large segment of the Minnesota Bar.

The Minnesota State Bar Association feels very strongly that the "control group test," adopted by the trial court and urged by petitioners here would very seriously impair the attorney-client privilege of corporations, and would seriously curtail communication by corporate employees with counsel. The result would necessarily be that attorneys for corporate clients would be greatly restricted in securing information, either for the purposes of advice or for the purposes of litigation. Under such circumstances, the effectiveness of the lawyer's representation of his client would be seriously diminished.

The Minnesota State Bar Association submits that the test enunciated by the Court of Appeals fairly balances the need for the uninhibited communication with counsel which the privilege permits with the need for freedom of discovery in litigation. We believe that such a test is infinitely preferable to the "control group test" adopted by the trial court.

The parties hereto are primarily concerned with the peculiar aspects of the attorney-client privilege which are here involved. The Minnesota State Bar Association, in common with the American Bar Association, is interested in the broader aspects of the attorney-client relationship which must necessarily be involved in any decision of this case, and wishes therefore to present to this Court policy considerations which are of the greatest importance to the Minnesota State Bar Association and to the legal profession which it represents.

The Minnesota Bar Association believes that the following questions which are crucial to it will not be presented by the parties herein:

1. Whether a communication by an agent or employee of a corporation to the attorney for the corporation is within the scope of the privilege;

2. Whether an attorney for a corporation may be required to disclose information received from the corporation's agent or employee which may reveal a violation by the agent or the employee of a law imposing criminal sanctions, with the result that the agent or employee will be deprived of the privilege against self-incrimination;

3. Whether the "control group test" will so discourage communication by corporate employees and agents with the corporation's attorneys that the attorney will in effect be prevented from giving advice to insure corporate compliance with the law.

WHEREFORE, the Minnesota State Bar Association prays that it be permitted to appear herein *amicus curiae* in support of the position of the respondents, and to adopt as its own the brief and argument of the American Bar Association herein.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OBJECTION TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OBJECTION TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The petitioners respectfully object to the motions for leave to file briefs as *amici curiae* which have been submitted by the American Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyers' Association, and the motions of the Ohio State Bar Association and the Minnesota State Bar As-

sociation to join in the brief of the American Bar Association.

The petitioners have refused to consent to the filing of these *amici* briefs, and, pursuant to Supreme Court Rule 42(3), state the following reasons for withholding such consent.

1. The two *amici* briefs raise no issues which are not adequately and thoroughly discussed in the brief of respondents. The respondents are represented by sixteen well-known corporate law firms, located in Chicago, New York and Boston. These defense counsel have exhaustively presented the broad hypothetical policy arguments in support of the alleged attorney-corporate client privilege. The *amici* briefs reiterate and belabor issues which have been vigorously contested in the lower courts and fully briefed by the parties to this action.

2. The respective bar associations have no interests which differ from the interests already advanced by respondents on behalf of corporations and the corporate defense bar. In their motions for leave to file briefs and their *amici* briefs, the bar associations merely subscribe to the argument that the coverage of the attorney-corporate client privilege should be extended for the same reasons expressed in the brief of respondents.

The privilege to file an *amicus curiae* brief should not be granted in these circumstances.

Wherefore, petitioners request that this Court den the motions for leave to file *amici curiae* briefs.

Respectfully submitted,

LEE A. FREEMAN, JR.
On behalf of Petitioners

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August 1970.

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No. 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION OF THE ILLINOIS STATE BAR ASSOCIATION FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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MOTION OF THE ILLINOIS STATE BAR ASSOCIATION FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

The Illinois State Bar Association (the Association) respectfully moves under paragraph 3 of Rule 42 of the Supreme Court Rules for leave to file a brief *amicus curiae* in support of the position of respondents in this cause by joining in the brief heretofore filed by the American Bar Association as *amicus curiae*. Counsel for the respondents and for the American Bar Association have consented to the granting of this motion. Consent of petitioners' counsel has been requested but has been denied.

The Illinois State Bar Association is the second largest voluntary bar association in the nation, including within its

ranks approximately 14,500 members of the bar. Illinois practitioners serve one of the largest business and commercial centers in the United States. According to responsible and informed authorities, more than 85% of all the business of this country is conducted in corporate form. See United States Department of Commerce, *Survey of Current Business*, Volume 5, No. 7, Page 21 (July, 1970). Therefore, any proposal which would drastically reduce the effective utilization of counsel by corporate clients and adversely affect the administration of law in the business community is a matter of vital importance to the lawyers in Illinois and throughout the country.

The Association supports in all respects the arguments set forth in the brief of the American Bar Association. We urge rejection of the petitioners' plea that the Court embrace the "control group" test followed by the trial court. For all practical purposes the adoption of the "control group" test would deny the attorney-client privilege to all corporate clients. Arguments advanced by the petitioners in this cause were fully considered and firmly rejected in *Radiant Burners, Inc.* v. *American Gas Association, et al.*, 320 F.2d 314 (7th Cir. 1963), *cert. den.*, 375 U.S. 929 (1963).

This case has aroused widespread concern among the members of the bar because of their conviction that the use of the "control group" concept destroys the integrity of the professional relationship, so far as corporate clients are concerned, and jeopardizes the constitutional protection of corporation employees against self-incrimination.

The Association respectfully urges that the far-reaching policy issues presented should not be considered solely in the context of the case at bar or even in the broader context of legal matters in litigation. One of the unique characteristics of the American legal system is that lawyers are advisers and counsel to clients, as well as their advocates in litigation.

Administration and enforcement of the growing mass of laws and regulations affecting American business depends heavily upon an independent bar. The American legal counsel brings independent professional judgment, as well as knowledge of the law, to the assistance of his client. This principle underlies much of the new Code of Professional Responsibility, approved by the House of Delegates of the American Bar Association in August, 1969, and already adopted by more than a score of the states. (See Canon 5 of the Code.) In order to assist in maintaining the integrity of the legal profession, the new Code in certain instances places an affirmative duty on lawyers to disclose unprivileged knowledge of professional misconduct that is prejudicial to the administration of justice. (See Canon 1 and Disciplinary Rule 1-103 of the Code.) In a period when growing disrespect for law is a matter of national concern, it would be contrary to the public interest to cripple, if not effectively destroy, the role that the members of the legal profession have in achieving voluntary compliance with business laws and regulations.

In view of the transcendent public importance of the question presented in this cause and its impact upon the nature and extent of lawyer-client relationship, it is respectfully suggested that counsel for the American Bar Association be permitted to participate in the oral argument in order to present fully the views of the members of the bar.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

BRIEF AMICUS CURIAE

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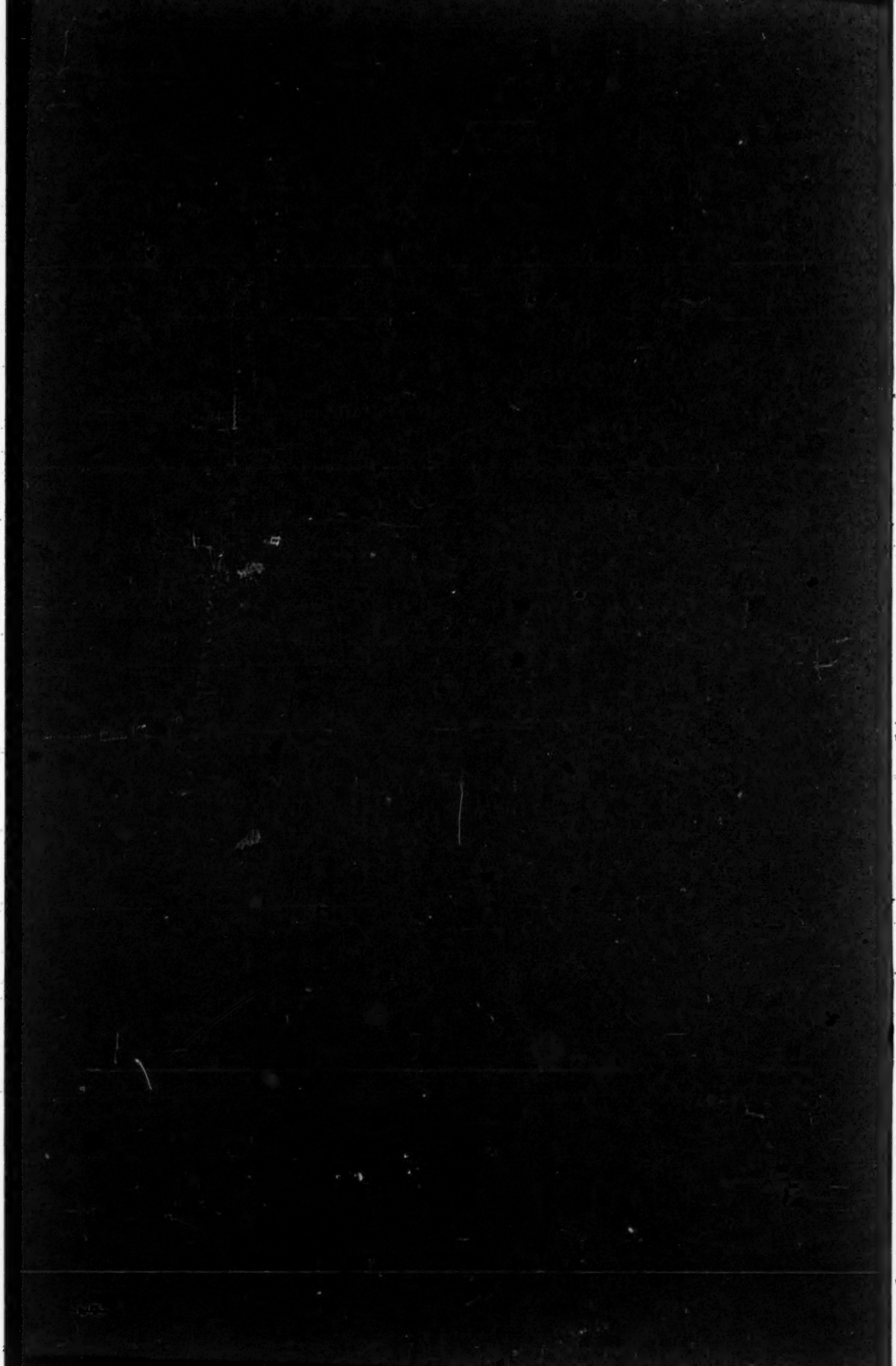

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MOTION FOR LEAVE TO FILE AMICUS CURIAE

Edward S. Irons and Mary Helen Sears, members of the Bar of this Court, respectfully move under the provisions of Rule 42(3) for leave to file a brief amicus curiae in order to present certain views generally supportive of petitioners in this case, but not advanced by either party or the present amici. Consent of petitioners was requested and refused; respondents were provided with a draft of the brief but have taken no position.

Movants are lawyers primarily engaged in representing corporate clients in patent, trademark and unfair competition matters before the courts. In the course of this practice, movants have from time to time devoted considerable effort, thought and study to the problem of delineating the proper compass, if any, of attorney-client privilege in these fields of law, especially for corporate clients. As a part of these endeavors, movants recently represented Natta in *Natta* v. *Hogan*, 392 F.2d 686 (10 Cir. 1968), relied upon by both litigants and both of the present amici in this case, as well as in *In re Natta*, 410 F.2d 187 (3 Cir, 1969), *cert. den. sub nom. Montecatini Edison S.p.A.* v. *E.I. duPont de Nemours & Co.*, No. 322, O.T. 1969 and *Natta* v. *Zletz*, 418 F.2d 633 (7 Cir. 1969).

In the present case we have noted at least three major topics central to any attempt at "[a]n authoritative delineation of the scope of the attorney-client privilege available to corporate clients" (Motion of the American Bar Assn. for Leave to File a Brief . . . , p. 1) which have not been treated by the parties or the present amici, *to wit*:

1. Attorney-client privilege is a creature of state law, application of which is governed by *state* statutory provisions and *state* common law. Applicability, if any, of state law privilege criteria to resolution of matters arising under federal law is a subject which has received relatively little attention from, but is deserving of concentrated scrutiny by, this Court.

2. A corporation is a state-created hypothetical "person" composed of numerous natural persons whose specific identity is constantly changing. It is presumably chartered under state law for public benefit. The extent, if any to which its actions may encroach upon or run counter to imperatives of federal law and yet be protected by state law privilege concepts is also worthy of this Court's attention.

3. In many areas of federal law where corporations are active the corporate entity has a fiduciary duty to disclose fully to the government *all* relevant facts. This duty is seemingly inconsistent with the recognition of attorney-client privilege in the apposite areas of federal law, regardless of whether the theory of the corporate control group be otherwise accepted.

In their zeal to obtain a convenient generalized rule of thumb for use in testing attorney-client privilege claims by corporations the litigants and the amici alike overlook the dangers implicit in the possible adoption of a blanket rule lacking sufficient flexibility to meet the frequently competing demands of corporate self-interest, state law and federal law—demands which vary from one field of state or federal law to another.

An additional point central to the resolution of the present controversy but overlooked by the parties and the present *amici* is the focal public policy of both state and federal law which dictates that the scope of privilege available to corporations not exceed that available to ordinary non-corporate clients. This policy consideration militates against a holding which would significantly strengthen corporations in contests against non-corporate private parties and thereby necessarily "deleteriously affect the legal representation"[1] and even the constitutionally guaranteed rights of the latter. We wish to present to the Court those policy considerations flowing especially from the Fifth Amendment which foreclose an artificially broadened concept of attorney-client privilege for hypothetical corporate "persons" that by its very nature could not be availed of by natural persons.

We believe that the conceded "significance of this cause to the administration of justice"[2] which assertedly

[1] "Motion of the American Bar Association for Leave to File . . .", page 2.

[2] "Motion of the American Bar Association for Leave to File . . .", page 2.

goes "to the very roots of the relationship between every member of the Bar and his corporate clients" [3] renders it appropriate and important for the Court to entertain all viewpoints before deciding this matter. We accordingly respectfully request that our brief be received and considered.

Respectfully submitted,

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[3] "Motion for Leave to File Brief Amicus Curiae", filed by the Association of the Bar of the City of New York and the New York County Lawyers Association, page 2.

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BRIEF AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Our interest here is the same as that of the American Bar Association—*i.e.*, "in focusing on the impact of the privilege in areas beyond the very limited aspect involved in this cause and presenting the policy considerations amicus believes crucial" (ABA Br., p. 2). As practicing lawyers with considerable experience in attorney-client privilege questions as applied to corporations, we desire to present for the Court's consideration those

policy considerations not put forth by the litigants or the bar association amici, which we believe to be controlling on certain aspects of any effort at "[a]uthoritative delineation of the scope of the attorney-client privilege as applied to corporations" (ABA Br., p. 2).*

ARGUMENT

I. Introduction

Since virtually the inception of our jurisprudence, it has been recognized that "The rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly", *Foster* v. *Hall*, 29 Mass. (12 Pick.) 89, 97 and "is not to be extended beyond the limits of that principle of policy upon which it is allowed", *Hatton* v. *Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833). "[T]he suppression of evidence which it [privilege] effects can be justified only when the limitations which restrict the scope of its operation are assiduously heeded", *People's Bank* v. *Brown*, 112 F. 652, 654 (3 Cir. 1902).

Wigmore, paraphrasing these early decisions and citing *Foster*, teaches that privilege is "an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle", 8 Wigmore on Evidence § 2291 at 554. There is ostensibly general acceptance of this teaching. *Radiant Burners, Inc.* v. *American Gas Assn.*, 320 F.2d 314, 323 (7 Cir. 1963); *N.L.R.B.* v. *Harvey*, 349 F.2d 900 (4 Cir. 1965); *Falsone* v. *United States*,

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* As used hereinafter "P. Br." refers to the Petitioners' Brief; "R. Br." refers to the Respondents' Brief in Opposition; "ABA Br." refers to the Brief of the American Bar Association as Amicus Curiae and "BANY Br." refers to the Brief Amicus Curiae of the Association of the Bar of the City of New York and New York County Lawyers Association, "Pet." as used herein refers to the Petition.

Unless otherwise indicated all emphasis in quotations is added.

205 F.2d 734 (5 Cir. 1953); *United States* v. *Summe*, 208 F.Supp. 925 (E.D. Ky. 1962). See also *Ortiz* v. *H.L.H. Products Co.*, 39 F.R.D. 41 (D. Del. 1965), citing and quoting the comparable § 2192 of Wigmore to the effect that privileges "should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice".

Nevertheless the teaching is honored far more in breach than otherwise. The lower federal courts, while paying it lip service, *in practice* indulge an ever increasing number of factual assumptions, presumptions and legal fictions in lieu of evidence to achieve *de facto* an ever broader scope of attorney-client privilege.

The case at bar is a good example of the tack customarily taken in the lower federal courts. The record below is devoid of evidence that the communications in issue were "made in confidence" (P.Br. 19, 25-26). Even respondents tacitly so acknowledge by failure to point to any pertinent proofs. Confidentiality is an *absolute prerequisite* to the existence of attorney-client privilege; it is a focal point of Wigmore's fundamental conditions necessary to establishing privilege quoted at P. Br. 22-23 (see also P.Br. 19-20; ABA Br. 3). A strict construction of the attorney-client privilege principle as counselled by Wigmore and other authorities cited hereinabove would perforce disqualify the communications here in issue on the ground that confidentiality was not proved below by the proponents of the privilege. Under the restrictive Wigmore approach confidentiality may not be assumed or presumed; to find privilege without *proof* of confidentiality is to erect an "obstacle to the investigation of the truth . . . to the administration of justice" without justification or necessity.

By similar all-too-typical treatment in other cases and other courts, attorney-client privilege is rapidly assum-

ing the role of the sacred cow in our legal system.[1] When its disciples couple their defense of its ascendancy, as here, with pleas for validation by this Court of various fictitious assumptions and presumptions that will not only guarantee its sovereignty over other public policy considerations even in the federal system, but will effectively endow the corporate form of existence with unequal advantage before the courts over natural persons, the time has surely come to call a halt to its encroachments upon "truth" and "justice".

II. The Questionable Premises Underlying the Arguments for Unlimited "Privilege" for Corporate Clients

It is argued by respondents and their amici that corporate clients *must* be entitled to attorney-client privilege for *all* communications between any employee in the course of his employment and any lawyer for the corporation (presumably whether or not also an employee), if the corporation is to be able to seek and receive legal advice at all. It is said, e.g., that any other state of affairs "would adversely affect the administration of justice in this country by impeding effective counseling of corporations and damaging the individual rights of their agents" (ABA Br. 5).[2] It is darkly hinted that lawyers will refuse full and conscientious representation of corporate clients unless the scope of privilege be as sought—it is said that otherwise "it takes little imagination to envision the limited role which counsel will be willing to undertake in future counselling" (BANY Br.

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[1] A similar treatment was accorded the evidentiary prerequisites to recognition of privilege in, *e.g.*, *Natta* v. *Hogan*, 392 F.2d 686 (10 Cir. 1968); *In re Natta*, 410 F.2d 187 (3 Cir. 1969); *cert. den. sub nom. Montecatini Edison S. p. A.* v. *E. I. du Pont de Nemours & Co.*, No. 322, O. T. 1969 and *Natta* v. *Zletz*, 418 F.2d 633 (7 Cir. 1969).

[2] We understand that "agents" here means at least *any* corporate employee.

10-11).[3] Respondents say that the control group test, acknowledged by the Seventh Circuit to be "similar" to that of "Rule 5-03 (a)(3) Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969" (Pet. 4a), "would in major part destroy the protection provided by the attorney-client privilege to the modern corporation, and in turn would deprive the public of the benefit which it receives when a corporation's policies and procedures are based on well-informed legal advice." (R.Br. 13).

These arguments are appeals to emotion. They have no foundation in fact, as is apparent from the respondents' studied avoidance (and that of their amici) of advancing facts to support their positions. The facts which *are* put forth show clearly that the modern corporation could *not* function absent day to day legal advice. As said by the American Bar Association,

> ". . . Today the American corporation must exist in a great welter of regulatory statutes whose observance requires legal advice on virtually every aspect of its affairs. Every transaction involving corporate financing, its competitors, its customers, its employees or foreign trade, is governed by complex regulatory statutes which, in most instances, in addition to subjecting the corporation to severe risks, subject the corporate agents to criminal penalties. If a corporation is to comply with the law, it *must* have legal counsel freely available at all levels of its operations" (ABA Br. 7).

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[3] Actually, this "limited role" argument is purely imaginary as even a few moments' reflection will demonstrate. It stands admitted that "the modern day lawyer may be more frequently called upon by his corporate clients than by the individuals whom he represents" (BANY Br. 6). The suggestion that lawyers will eschew some or all of their livelihood if blanket privilege be denied to corporations is patently unreasonable—particularly when it is remembered that the privilege is *solely* for the client's benefit and *not* for that of the lawyer.

> "A layman could not hope to evaluate the significance of factual variations and distinctions, shadings of difference between various situations. . . ." (ABA Br. 8)

Respondents agree that

> ". . . A modern corporation, depending upon its size, may act through and be bound by the actions of hundreds or thousands of persons. . . . Any of them . . . may be equally in need of adequate legal advice with respect to conduct for which the company may be liable." (R.Br. 13)

The Association of the Bar of the City of New York admits to a "complex maze of regulatory legislation within which a corporation *must* now operate" (BANY Br. 8).

On the face of the acknowledged corporate need for intensive day-to-day legal counsel, it is unreasonable to suggest that corporations would either put roadblocks in the way of obtaining effective advice or else cease seeking it altogether if this Court were to hold that blanket corporate privilege for legal consultations is unavailable.[4]

Manifestly, the corporate entity does not require any inducement to seek legal advice. Unlike an ordinary person, the corporate "person" is dependent for its very existence upon its continued compliance with applicable law, state and federal. Legal advice is vital to insure this compliance.

As this Court observed in *Hale* v. *Henkel*, 201 U.S. 43 (1906):

> ". . . there is a clear distinction . . . between an individual and a corporation. . . . The individual

[4] Indeed, it is apparent on the face of all the papers before the court that the "control group test" which is a limitation upon corporate privilege has been accepted in various courts. There is no evidence and no suggestion that corporate consultation with lawyers *has* in any way diminished consequent from prior application of that test.

may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. . . . He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. . . . His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. . . . He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the state. *It is presumed to be incorporated for the benefit of the public.* It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. . . . *Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation.* There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. . . .

". . . franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. . . . The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress."

The distinctions which this Court has always recognized between the natural person and the corporate being *per se* demonstrate why the natural person who "owes nothing to the public so long as he does not trespass upon their rights" *may* require the inducement provided by

attorney-client privilege even to seek legal advice in appropriate circumstances; on the other hand, the corporate entity by its very nature is *obligated* to keep itself properly advised legally.[2] It follows that the policy considerations applicable to natural persons have no place insofar as the corporate being is concerned.

The Association of the Bar of the City of New York urges that the policy which justifies privilege is the need for truth "in a forum other than the courtroom, even at the risk of non-disclosure during litigation" (p. 10)—to wit, the private forum presided over by the attorney wherein he determines the course of action to suggest to his client. But there is no incentive for the corporation—which enjoys no intrinsic right of privacy and no right against self-incrimination, *Hale* v. *Henkel, supra; Wilson* v. *United States*, 221 U.S. 361 (1911)—to withhold facts from its lawyer. The corporation cannot gain by this; it can only suffer because it will receive bad legal advice which, carried to the ultimate, will jeopardize its continued existence.

Some of the arguments advanced by respondents and their amici are merely veiled pleas for a limited corporate privilege against self-incrimination under the guise of attorney-client privilege in derogation of *Hale* v. *Henkel, supra*, and *Wilson* v. *United States, supra*. In particular, the American Bar Association evinces a great concern for the individual corporate employee's personal Fifth Amendment privilege against self-incrimination (ABA Br. 9-11). The argument overlooks the fact that an individual corporate employee, in order to be subject to a personal criminal charge for the acts committed by the corporation *must* be *at least* a managing agent with

[2] In line with this, natural persons have the right to defend and prosecute civil cases *pro se* and may even defend criminal cases on the same basis if they so choose freely and knowingly. Corporations, being impersonal, *a fortiori* cannot do so without risk of being cited for unauthorized practice of law and hence must utilize either employee "house counsel" or retained "outside counsel" in both civil and criminal cases.

power to decree performance of the challenged acts. Such a person would *a fortiori* be incidentally protected against self-incrimination by the "control group" test for attorney-client privilege which petitioners espouse. A lesser employee not subject to a criminal charge for the acts of his corporate employer would have cause to be concerned about self-incrimination in this context *only* if he had performed acts repudiated by the corporation as outside the scope of his employment. In such a case, corporate privilege could not help him.

To accord the corporation privilege in investigating the circumstances of questionable acts committed by such lesser corporate employees with no decision-making power is to jeopardize, not save, the individual rights of these lesser employees. As the American Bar Association brief itself points out, "privilege is inapplicable where the agent [employee] is being interviewed as one whose interests are adverse to those of the principal, [corporate employer]" (p. 18). A lesser corporate employee has no way of knowing in advance of an interview—nor does corporate counsel who conduct the interview—whether it will be considered, after the story is told, that he acted outside the scope of his employment and hence is cast in a role adverse to his employer. It follows that any corporate "privilege" theory which will permit the corporation through its lawyers to investigate questionable acts of lesser employees will protect *only* the corporation, leaving the individual employee at the mercy of his corporate employer, who, having learned the facts, may take the position that the unfortunate employee was embarked upon an excursion of his own. The employee's discussion with the corporate lawyer is a waiver of his personal privilege against self-incrimination, from which he gets no benefit but the maintenance of his livelihood whether or not corporate privilege be afforded the interview. In later litigation, in which the corporation accuses the individual of civil or criminal fault, the interview with the corporate lawyer can and will be used

against him by the corporation. Plainly, the only right against self-incrimination that would or *could* be protected by recognizing attorney-client privilege on the broad scale opted for by the respondents and their amici is the corporation's own *non-existent* right against self-incrimination; see *Hale* v. *Henkel* and *Wilson* v. *United States*, *supra*.

The assumption that failure to recognize blanket corporate privilege would somehow make the attorney a competent witness against the corporation in litigation is likewise not well founded. Unless the attorney himself be an actor in the subject matter of the litigation, having personal knowledge of relevant facts, his testimony —whether in the form of his contemporaneously written notes or given orally—is at best hearsay, useful under the discovery rules to aid in the development of competent relevant evidence from the real actors whose identies might otherwise be concealed, but not *per se* probative of facts. The other use to which the attorney's testimony or notes *might* competently be put is to contradict, challenge or impeach testimony by a witness inconsistent with what he earlier told the corporate lawyer. The horribles envisioned by the amici where attorneys' "testimony on cross-examination [might] form the strongest evidence in support of an attack on their client" (ABA Br. 6) or "counsel may later be compelled to be a dangerous witness against his own client" (BANY Br. 9) do not mesh with reality and are not a practical deterrent to confining attorney-client privilege for corporate clients within the narrowest possible bounds as counselled by Wigmore for *all* types of clients.

Respondents and the bar association amici argue that the lowest echelon corporate servant, in disclosing facts to the company attorney in order to enable the latter to give legal advice to higher echelon employees, should be considered as an "agent" of the latter, citing 8 Wigmore § 2317 (McNaughton Rev. 1961) (R. Br. 10; BANY

Br. 7; ABA Br. 7). The difficulty with this proposition is that "agent" as used in § 2317 has meant an intermediary, a conduit of information from client to attorney[6]—not, as here, a person who has independent knowledge of facts *unknown* to the person seeking the legal advice and empowered to act as the "client". In similar circumstances to those posited here, a natural person could not claim "agency" or privilege for a communication to his attorney of facts unknown to him. To give some practical examples,

(a) A private householder, albeit responsible for a tort committed by his hired household help in the course of employment, cannot hold as privileged a communication by his employee outside his presence, to his attorney, of facts unknown to him.

(b) A private person who has assumed a debt for his child, parent, brother or sister cannot obtain personal privilege for a communication by his child, parent, brother or sister, to his attorney, outside his presence, of facts unknown to him.

The scope of privilege sought for corporations would obviously reach far beyond that available to natural persons under § 2317. It should *not* be adopted—*inter alia*, because it would be a vehicle for denigrating the Fifth and Fourteenth Amendment rights of natural persons. In any litigation between a natural and a corporate party the latter would enjoy undue advantage, contrary to the due process guarantee of the Fifth Amendment. Even in the seeking and obtaining of legal advice the corporation would enjoy greater—and hence unequal—protection under law, in derogation of the Fourteenth Amendment.

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[6] For example, a messenger, a clerk, an interpreter, a confidential secretary. See *In re Busse's Estate*, 75 N.E. 2d 36 (Ct. App. Ill., 2nd Dist. 1947), where the agent was the client's nurse and business caretaker; *Foley* v. *Poschke*, 31 N.E. 2d 845, syl. 2 (Sup. Ct. Ohio 1941) where the agent was a divorce plaintiff's hired detective.

In short, if there *is* a justification for recognizing attorney-client privilege to corporations at all—and certainly no valid one is put forth by respondents or their amici—the privilege *must* be confined within the narrowest possible limits. The widest scope of attorney-client privilege that corporations could be permitted without impinging upon the rights of natural persons is one consonant with the "control group" formula.

But even there we believe that the establishment of a blanket rule according privilege to control group personnel would be unwise, and that, if corporate privilege in any degree is deemed to be consistent with the nature of the corporate being, the Court should confine its privilege pronouncement to the case at bar—possibly with an accompanying definition of the outermost limits of corporate privilege in terms of the control group test—and leave the further development of restrictions to a case-by-case approach. Our reasons are set forth in the ensuing portions hereof, which are intended as exemplary rather than exhaustive and are drawn largely from the problems privilege poses in the patent field with which we are especially familiar.

III. The Federal Supremacy Doctrine Precludes Subversion of Federal Policy to State Law Privilege Concepts

In *Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U.S. 457 (1877), this Court recognized that even in a diversity case involving natural persons, the federal courts are not bound by state law rules affecting privilege. Refusing to follow the Ohio privilege statute, the Court emphasized:

> ". . . The laws of the State are only to be regarded as rules of decision in the courts of the United States where the Constitution, treaties or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that it [sic is] to say on all subjects on which it is com-

petent for them to speak. There can be no doubt that it is competent for Congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and where Congress has declared the rule, the state law is silent. Now, the competency of parties as witnesses in the Federal Courts depends on the Act of Congress in that behalf, passed in 1864, 13 Stat. at L., 351, and codified in the Revised Statutes, section 858. It is not derived from the Statute of Ohio; and is not subject to the conditions and qualification imposed thereby. . . ."

The same principle of federal supremacy has been repeatedly recognized with respect to other state law concepts in all fields of the law. In the patent context, this Court has been diligent to fend off encroachments upon supreme federal law by antithetical state law concepts.

Thus, in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), this court held that the patent laws "like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. . . . When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law" (376 U.S. at 229).

In *Sears, Roebuck* and its companion case, *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), this federal supremacy principle was invoked to repudiate any interpretation of state unfair competition laws to prevent copying of unpatented and unpatentable articles.

This same principle has repeatedly been invoked in this Court to preclude conflicting state contract law concepts from overriding federal patent and antitrust laws.

In *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249 (1945); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Katzinger* v. *Chicago Metallic Mfg.*

Co., 329 U.S. 394 (1947); *MacGregor* v. *Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402 (1947); and most recently, in *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969), this Court has foreclosed the application of state law contractual estoppel principles to prevent patent licensees or assignors from challenging the validity of licensed or assigned patents. In *Brulotte* v. *Thys Co.*, 379 U.S. 29 (1964), this Court refused to permit application of state law freedom of contract principles to effectively frustrate the federal law which limits the life of a patent.

Precision Instrument Mfg. Co. v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945), effectively forecloses the use of state law evidentiary requisites to the establishment of perjury, fraud and the like from defeating the federally superior duty of patent applicants to fully advise the Patent Office of *all* relevant facts concerning the equities of their pending patent applications.

And in *Sperry* v. *Florida*, 373 U.S. 379 (1963), this Court held that the prerogative of the states to regulate the practice of law within their boundaries could not be utilized to interfere with the Patent Office prerogative under federal law to license nonlawyers in any state to engage in patent solicitation activities before it.[7]

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[7] Though not a privilege case, *Sperry* spawned an expansion of the scope of attorney-client privilege afforded by the lower federal courts in patent cases. Compare, *e.g.*, *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792 (D. Del. 1954), confining the privilege within narrow limits, to *Sperti Products, Inc.* v. *Coca-Cola Co.*, 262 F.Supp. 148 (D. Del. 1966) which relied on *Sperry* to effect a considerable expansion. See also *Sperry Rand Corp.* v. *International Business Machines Corp.*, 45 F.R.D. 287 (D. Del. 1968), an attempted harmonization of *Sperti* with *Zenith* and its progeny by restricting applicability of *Zenith* to *ex parte* patent solicitation. Even this attempt at preserving the *Zenith* rationale based on the Wigmore conditions (*supra* p. 3) was cast aside by the Third Circuit in *In re Natta*, 410 F.2d 187 (1969) in favor of a liberal scope of privilege recognition in all patent cases.

Cf. the contrary—we believe correct—interpretation of *Sperry* v. *Florida* in *Channel Master Corp.* v. *RMS Electronics, Inc.*, 159 USPQ 344 (SDNY 1965).

There is *no* federal privilege statute. There likewise is *no* federal common law. It follows that privilege concepts, if they are to be applied at all under the presently prevailing statutes, must derive from state statutory or common law.

In such circumstances this Court should exercise great caution in fashioning a blanket privilege test for corporations lest it give too much protection to the corporate client in derogation of the public interest. In each specific type of federal claim case that may arise, the lower courts should be in a position to balance carefully the competing needs of public policy as implemented by federal law and the social policy, status of which derives from state law only, that is designed to foster the attorney-natural person client relationship by immunizing from disclosure to third persons all communications from the client to the attorney for the purpose of obtaining competent legal advice and all resultant advice. In circumstances where corporate clients are involved—and the privilege is hence *not* an essential inducement to free communication between the attorney and the client—it is particularly difficult to justify the interposition of the state law privilege concept, an admitted obstacle to the search for truth, in frustration of federal law and the overweening public policy it implements.

In spheres where federal law is dominant, including the antitrust context of this case, recognition of *any* corporate privilege is a repudiation of federal supremacy on its own ground—and without any offsetting benefit to society.

IV. Where Federal Law Mandates Full Disclosure, Privlege Is Superfluous

This Court in *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945), defined as an "uncompromising duty" the responsibility of all patent applicants to report to the Patent Office

"all facts concerning *possible* fraud or inequitableness underlying the applications in issue". It said,

> ". . . This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independant legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud'" (324 U.S. at 818).[8]

In *Kingsland* v. *Dorsey*, 338 U.S. 318 (1949), this Court recognized that the "uncompromising duty" to fully inform the Patent Office devolves equally upon the applicant *and* his patent solicitor.

In *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (1968), the Sixth Circuit held that the uncompromising duty imposed by *Precision* and *Kingsland* upon patent applicants and their attorneys extends to *all information* deemed relevant by the patent examiner regardless of whether the examiner's "interpretation of patent law . . . is contrary to the controlling decisions" (401 F.2d at 585-6)—and in view of a patentee's failure to thus fully inform the examiner, affirmed a Federal Trade Commission decree of unfair competition requiring compulsory licensing of the tainted patent.

In *Natta* v. *Hogan*, and in *In re Natta* and *Natta* v. *Zletz* which followed it, lip service was paid to this uncompromising duty, but the duty was construed as a mere "interest in the development of truth" (392 F.2d

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[8] See also *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944); *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240 (1933); and *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965).

686, 692) such as is present in all litigation. By this legerdemain each court justified its own continued use of state law privilege concepts as a mechanism for overriding or evading federal patent policy. This Court has not yet considered the propriety of privilege recognition either in patent cases or controversies arising under other federal full disclosure laws such as the SEC statute in issue in *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2 Cir. 1968), *cert. den. sub nom. Coates. Securities and Exchange Commission*, 394 U.S. 976 (1969) cited at ABA Br. 8. See also *Escott* v. *Barchris Construction Corp.*, 283 F.Supp. 643 (S.D. N.Y. 1968).

In *Wilson* v. *United States, supra*, however, the Court was careful to explain that even a natural individual has no self-incrimination privilege incident public books and records he is by law required to keep. In particular, this Court said:

> ". . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained.
>
> * * * *
>
> ". . . In State ex rel. McClory v. Donovan, 10 N.D. 203, 86 N. W. 709, the defendant was a druggist who was required by statute to keep a record of all sales of intoxicating liquors made by him, which should be subject to public inspection at reasonable times. It was held that the privilege against self-crimination was not available to him with respect to the books kept under the law, for they were 'public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection.'" (221 U.S. 380-1)

The analogy between mandatory full disclosure and documents or books required to be maintained for public benefit is a close one. The question of whether attorney-client privilege, a state law concept designed primarily to induce consultation of lawyers by natural persons in their private roles, has any proper place under those federal laws which rest upon the policy of full disclosure for public benefit merits more incisive consideration than it received in the Third, Seventh and Tenth Circuits in the Natta cases. It is directly germane to the corporate privilege issue here raised because the privilege claimants in most patent, SEC and other full disclosure cases are corporations.

If corporate privilege is to be maintained on any scale or for any purpose, we urge the Court to abjure lying down a rule broad enough to pre-empt the full disclosure cases. We believe that these areas above all are ones in which attorney-client privilege, regardless of the nature of the client, should and must ultimately yield to the paramount public good.

CONCLUSION

The problem of attorney-client privilege as an obstruction to truth in the administration of justice merits a much more searching scrutiny than has heretofore been given it. For this reason the Court should proceed with great caution in laying down a broad rule recognizing privilege for any particular class of "client".

Respectfully submitted,

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No. 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

v.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPPOSITION TO MOTION OF EDWARD S. IRONS AND MARY HELEN SEARS TO FILE A BRIEF AMICUS CURIAE

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In view of the public importance of the issue here presented and the motions of the American Bar Association and the New York Bar Associations for leave to file *amicus* briefs supporting respondents' position, respondents are reluctant to object to the filing of an *amicus* brief supporting petitioners—even though petitioners themselves have refused consent to the filing. Respondents nevertheless submit that the motion to file an *amicus* brief, submitted approximately three months later than the time specified in Rule 42(2),* should be denied for the following reasons:

* The petitioners' brief was due and filed on June 18, 1970; any *amicus* brief supporting the petitioners was due at that time. Respondents' brief was filed August 3, 1970, as were the *amicus* briefs filed by the American and New York Bar Associations.

1. Movants have asserted no interest in the issue presented sufficient to warrant their filing of an *amicus* brief. They say they are primarily engaged in "patent, trademark and unfair competition matters" and that "in the course of this practice [they] have from time to time devoted considerable effort, thought and study to the problem" of attorney-client privilege "in these fields of law, especially for corporate clients". In the *Natta* cases, which appear to have been terminated,* they did unsuccessfully contend that the attorney-client privilege (for individuals as well as corporations) should be more strictly limited in patent cases. But that gives them no adequate present interest in the issue in this case, other than the personal interest which any lawyer who has lost a case might have in a subsequent decision on a related question.

2. The proposed *amicus* brief deals with many matters extraneous to the instant case. Its principal contentions are (1) that because corporations are created by a state, corporations should not be accorded any attorney-client privilege (contrary to *Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir., 1963), cert. den., 375 U.S. 929 (1963)); (2) that corporations should not be granted a privilege broader than that allowed non-corporate clients, which the decision of the Court of Appeals in this

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* *In re Natta*, 410 F.2d 187 (3 Cir., 1969), cert. den. *sub nom. Montecatini Edison S.p.A.* v. *E. I. duPont de Nemours & Co.*, 396 U.S. 836 (1969); *Natta* v. *Hogan*, 392 F.2d 686 (10 Cir., 1968); *Natta* v. *Zletz*, 418 F.2d 633 (7 Cir., 1969). These cases in the Third, Seventh and Tenth Circuits were ancillary proceedings for the discovery of documents for use in a Patent Office interference proceeding, in which the taking of evidence has been concluded. Movants accurately assert that they "recently represented Natta" in those cases. They have since withdrawn as counsel. *Hogan* v. *Zletz*, U.S. Patent Office, Interference No. 89,634, Application to Withdraw as Attorneys, August 27, 1970.

case in no way permits and which no one in this case has ever suggested; and (3) that a narrower privilege or none at all be allowed corporations in patent cases—which this case is not. The proposed brief also contains inaccurate and unsupported statements of fact, such as the assertion that the communications in issue in the instant case were not made in confidence.

3. The proposed *amicus* brief is on its face a reply to the respondents' brief, as well as to the *amicus* briefs which were timely filed at the same time as respondents' brief. Since the proposed *amicus* brief should have been filed at least 30 days *before* those briefs, the movants are taking advantage of their tardiness in preparing and presenting their brief long after the time specified in Rule 42(2).

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SEP 24 1970
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE STATE BAR OF TEXAS FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

MOTION OF THE STATE BAR OF TEXAS FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

The State Bar of Texas (the State Bar) respectfully moves for leave to join the brief of the American Bar Association as *amicus curiae*. Respondents and *amicus curiae* have consented to the addition; the consent of the Petitioners was requested but has been denied.

The State Bar is the administrative agency of the Judicial Department of the State. *The State Bar Act*, Article 320a-1, Vernon's Civil Statutes of the State of Texas, Annotated. Section 1, Article III, Rules Governing the State Bar of Texas, reads as follows:

> "Section 1. Purposes
>
> The purposes of the State Bar shall be the advancement of the administration of justice and the science of jurisprudence; the encouragement of cordial intercourse among its members; the improvement of the relations between the Bench and the Bar and the public; and the protection of the professional interest of the members of the State Bar." page 207 1A Tex.Civ.St.

All persons practicing law within the State of Texas are required by law to be members of the State Bar. Its membership consists of slightly less than 20,000 attorneys.

The State Bar feels that the issues presented in this cause are vital to its members and the administration of justice. Adoption of the "control group test" as the standard for federal courts would not be in the best interests of the administration of justice and therefore the public. The State Bar is officially in agreement with the position expressed in the brief of the American Bar Association as *amicus curiae*, and would respectfully join with the American Bar in its brief.

Wherefore, the State Bar of Texas prays that it be granted leave to join in the brief of the American Bar Association as *amicus curiae.*

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Supreme Court, U.S.
FILED
NOV 20 1970
E. ROBERT SEAVER, CLERK

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On Writ of Certiorari to The United States Court of Appeals for The Seventh Circuit

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REPLY BRIEF

Defendants and their *amici* have reacted to the District Court's decision as if it meant the demise of corporate enterprise, and the end of corporate representation by the legal fraternity. But the hypothetical and extravagant contentions made in support of expanding the attorney-client privilege to cover all corporate employees should not obscure specific legal issues involved in this proceeding.

The first question to be dealt with is whether the Seventh Circuit misused the writ of mandamus to review the District Court's discovery ruling. Defendants have not argued that the District Court clearly abused its discretion by ordering production of the debriefing statements taken by counsel from corporate employees concerning their grand jury appearance. Indeed, such an assertion cannot be made in view of the fact that the District Court based its decision upon substantial federal precedent. While defendants attach "extraordinary importance" to the disputed legal issue with respect to the scope of the attorney-corporate client privilege, this offers no basis to circumvent the regular process of appellate review.

Passing this threshold issue, the District Court's decision must be considered in appropriate perspective. The District Court recognized the attorney-corporate client privilege, but limited its application to those officials having responsibility over the corporate matters upon which the attorney is consulted. The control group test, as applied by the District Court, protects communications between counsel and those executives, officers or other management personnel who are in a position to make corporate decisions or fix litigation strategy. These are the only individuals who may be deemed to constitute the corporate client in accordance with the traditional rationale of the attorney-client privilege. None of the broad policy arguments made by defendants (Brief of Respondents 25-26) justifies extension of the privilege indiscriminately to all corporate employees.

THE CONTROL GROUP STRIKES AN APPROPRIATE BALANCE BETWEEN THE NEED FOR DISCLOSURE AND THE REASONS FOR AN ATTORNEY-CORPORATE CLIENT PRIVILEGE

While there are strong reasons for making the attorney-corporate client privilege a qualified one, and for abolishing the privilege altogether, this case concerns solely the District Court's ruling that the privilege can only be invoked as to communications between the corporate counsel and the effective control group.

Defendants have asked this Court to expand a rule of privilege that admittedly prevents disclosure of crucial information in the course of litigation. As this case forcefully demonstrates, the privilege results in the suppression of information necessary to proper judicial determinations. On the other hand, the supposed collateral benefits of the privilege are highly speculative and doubtful.

A. The evils of the privilege are substantial.

The need for discovery of debriefing statements—and the reason for resisting production—arises from the unavailability of this highly relevant material through alternative sources. Examination of witnesses themselves and inspection of corporate records give neither a full nor accurate picture of the alleged price-fixing conspiracy. Much of the illegal activity was not memorialized by the corporate employees who engaged in it. Many documents have disappeared as a result of regular corporate record destruction policies or otherwise. As may be expected in any complex case, the lapse of time between pretrial discovery and the crucial incidents in the price-fixing conspiracy has made witnesses unavailable[1] and erased the recol-

[1] At least one crucial witness, *i.e.*, James Heidelberger, whose debriefing statement is at issue, has died since his grand jury appearance.

lection of many witnesses. Moreover, from a comparison of several grand jury and deposition transcripts, the District Court concluded that witnesses were being "deliberately evasive" during their interrogation in these proceedings. Those debriefing statements obtained by plaintiffs further reveal instances in which witnesses were encouraged to give misleading testimony before the grand jury.[2] The theoretical assertion that "the same avenues of discovery are open to" the plaintiffs as were used by defense counsel (Brief of Respondents 14) cannot stand against these hard facts.

The record in this case belies the attempt to minimize the significance of the material which would be concealed if the attorney-corporate client privilege were extended, as urged by defendants.[3]

Since the corporation enjoys no privilege against self-incrimination, its records and employees are subject to examination by counsel. *United States* v. *Kordel*, 397 U.S. 1 (1970); *United States* v. *White*, 322 U.S. 694 (1944). Consequently, the attorney-corporate client privilege operates to protect facts that have been forgotten, altered or concealed. A great potential for abuse exists in these circumstances. The blanket application of the privilege would enable employees to suppress or withhold information previously disclosed to corporate counsel

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[2] Illustrative excerpts from the debriefing statement of Clarence N. Roland are quoted in the Brief of Petitioners, p. 35. This vitiates defendants' contention that access to the grand jury transcripts erases the need for plaintiffs to examine the debriefing statements. (Brief of Respondents 48)

[3] Although defendants argue that the privilege conceals nothing from corporate adversaries, they concede the significance of the debriefing statements to the ascertainment of facts by the plaintiffs. (Brief of Respondents 14-15, 47-49)

without fear of impeachment, and thereby defeat the ends of justice. Given the volume of business conducted through corporations in this country, the injurious effect of extending the privilege would be severe.

The defendants (and their *amici*) concede that the privilege may be used to suppress the truth, but argue that justice in the adversary process must be sacrificed to perpetuate an atmosphere of secrecy, reminiscent of a medieval guild, which is supposedly necessary for attorneys to persuade their corporate clients to obey the law.[4] In the face of a record showing that attorneys not only took advantage of prevarication by deposition witnesses, but encouraged evasion by these witnesses, it is hypocritical to contend that an area should be reserved for private law enforcement by corporate attorneys.[5] This contention runs counter to the entire philosophy of the increasingly more liberal pretrial discovery rules. The outcome of a case should not be changed by interposing attorneys between the injured parties and their access to the facts.

On the contrary, we urge that full disclosure of facts and the consequent enforcement of the law where violations are established will act as a deterrent to further illegal acts, and thus achieve greater compliance with the law. Such discovery is especially necessary for effective

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[4] *E.g.*, Brief of Respondents 27; American Bar Ass'n Br. 8; New York City Bar Ass'n Br. 10.

[5] A typical expression of this treme may be found in the brief of the Illinois State Bar Association:

> "In a period when growing disrespect for law is a matter of national concern, it would be contrary to the public interest to cripple, if not effectively destroy, the role that the members of the legal profession have in achieving voluntary compliance with business laws and regulations." (at p. 3).

private enforcement of the antitrust laws. See *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)

B. The supposed benefits of the privilege are illusory.

The defendants (and their *amici*) reiterate variations of the following policy argument for expansion of the attorney-corporate client privilege to cover communications from all employees:

> The absence of the privilege would impair the legal representation of corporations because corporations would be reluctant to consult attorneys or to disclose the facts underlying controversies to their counsel.

This case offers a unique opportunity to test these theoretical assertions against the actual situations that the privilege encourages.

Defendants argue that the sheer size of corporations, the number of their employees, and the continuous involvement of attorneys in corporate affairs create added policy reasons to extend the attorney-personal client privilege to the entire corporate structure. (Brief of Respondents 13, 23) But a corporation, outside of possibly management personnel who are responsible for making decisions on which legal advice is sought, cannot be mechanically equated with an individual for purposes of the attorney-client privilege. The communications between the many corporate employees and counsel do not occur in the atmosphere of confidentiality which the attorney-client privilege requires and was designed to foster.*

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*The touchstone of the attorney-client privilege is confidentiality. See *Cafritz* v. *Koslow*, 167 F.2d. 749, 751 (D.C. Cir. 1948).

Defendants seek to justify the blanket application of the privilege as necessary to promote free communication between employees and corporate counsel. (Brief of Respondents 21-22) But it is not logical to assume that an individual employee will be encouraged to make a *more* frank and full disclosure of facts to corporate management merely because a corporate attorney receives a copy of his report. The realities of corporate life are convincing that when a corporate executive calls for information, he gets it. Most intra-corporate memoranda are candid and complete, if not confidential, without regard to possible immunity against disclosure.

Attorneys occupy essentially the same position in the corporate hierarchy as executives with respect to obtaining full and accurate reports from subordinate employees. The corporate attorney is no longer an independent adviser occasionally consulted on matters of great personal importance. For all practical purposes, he is an officer involved in the myriad details of operating a business. The occasional has become commonplace. To insulate from examination every matter in which a corporate attorney has been involved would be to suppress much of the relevant information about the corporation's activities.

The reasons for which this Court has denied the privilege against self-incrimination to corporations militate strongly against the blanket imposition of the attorney-corporate client privilege to employees at all levels. The doctrine of confidential communications involves the personal rights of individuals to consult attorneys for legal advice. There is no way in which a corporation can behave so as to come within these personal privileges. This Court has held that individual representatives of an organization have no privilege to withhold its official

records and documents "even though production of the papers might tend to incriminate them personally." *United States v. White*, 322 U.S. 694, 699 (1944); *Wilson v. United States*, 221 U.S. 361, 382 (1911).[1] The expansion of the attorney-corporate client privilege as urged by defendants would achieve precisely the result that has been condemned in cases refusing to grant corporations the privilege against self-incrimination.

The admonition in *Hale v. Henkel*, 201 U.S. 43, 70 (1906) is particularly appropriate to this case:

> "As the combination or conspiracies provided against by the Sherman antitrust act can ordinarily be proved only by the testimony of the parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress."

These considerations were strongly reaffirmed in *United States v. White*, 322 U.S. 694, 700 (1944):

> "The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible."

No reason has been adduced why documents that corporations are not permitted to conceal by assertion of the

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[1] The absence of a corporate privilege against self-incrimination—even though the corporate documents may incriminate the individual who executed them—makes it fallacious to argue that the lack of a blanket attorney-corporate client privilege would be destructive of the individual employee's privilege against self-incrimination. (American Bar Ass'n Br. 9-11)

constitutional privilege against self-incrimination should, nonetheless, receive absolute protection under a rule having far less justification. Being a creature of the state, the corporation's right to invoke an attorney-client privilege must remain subject to the ultimate authority of the government to ensure compliance with the laws. This public interest will not permit a corporate defendant, such as the present ones, to conceal its operations behind the privilege in such a way as to mock the judicial process and defeat justice.

A litigant should not be denied access to facts gathered by counsel from corporate employees below the management level for fear that the remote prospect of such judicially supervised discovery would make corporations reluctant to hire lawyers.[8] In any event, this concern is unfounded. If, as defendants bemoan, the operation of corporate enterprises requires almost constant legal advice, corporations are not going to eschew lawyers simply because the facts memorialized by counsel may be subject to discovery in the course of judicial proceedings, no more than corporations would stop keeping necessary records of their policies and practices.

One cannot quarrel with the prediction that some attorneys may destroy or improperly withhold their memoranda from discovery. (American Bar Ass'n Br. 6) But to cite this possibility as a reason for expanding the absolute protection of the attorney-client privilege is like argu-

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[8] The supposition that a broad privilege may be useful to attorneys in securing clients offers no valid basis to extend, or recognize, the attorney-corporate client privilege. The issue ought certainly not to be whether the secrecy afforded by the privilege would advantage the bar or promote professional engagements.

ing for repeal of Rule 34 because some counsel may advise corporate officers to destroy intra-departmental communications which incriminate the company.

The defendants contend that absence of an attorney-corporate client privilege may unfairly penalize corporations which seek legal advice but nonetheless violate the law. Counsel's ability to induce voluntary compliance with the law would be frustrated, so the argument runs, if corporate adversaries were given access to facts collected by counsel concerning the illegal pratices that he warned against. But the Court of Appeals for the Fifth Circuit recently rejected the argument "that the prospective decision of the client on whether to abide by advice or disregard it, or the guarantee of a veil of secrecy, either establishes or narrows the attorney's obligation in the giving of advice. And to grant to corporate management plenary assurance of secrecy for opinions received is to encourage it to disregard with impunity the advice sought." *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1102 (5th Cir. 1970). If a corporate client persists in its unlawful activity after counsel's advice, such a law violator should not be protected from punishment by unreasoned barriers to the discovery of all relevant facts.

Just as the application of the attorney-corporate client privilege cannot depend upon whether the corporation was acting upon counsel's advice, the scope of the privilege should not turn upon whether the employee furnishes information to corporate counsel at the direction of his superiors.[9] This test, fashioned from whole cloth by the

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[9] Such a test would lead to the anomalous result that the corporation could suppress as privileged an employee's report of his illegal activities, and then argue without

Seventh Circuit, would make the privilege susceptible to unbridled abuse. The corporation could simply direct all employees to channel their regular business reports through corporate counsel, and thereby immunize any communication attributable to a corporate purpose. Such a result would offend whatever reason and authority exists for the privilege.

Analysis of the attorney-corporate client privilege in ordinary agency terms, pressed by defendants (Brief of Respondents 17-19) and adopted by the Seventh Circuit, begs the significant question: For what purpose may the employee be deemed an agent? To qualify as confidential within the meaning of the privilege, a communication must have been made for the purpose of securing legal advice. But the grand jury witnesses employed by defendants did not seek or receive legal advice on behalf of the corporation. (Appendix pp. 15a-17a). The employees were merely interviewed by attorneys for factual information about the grand jury investigation that the attorneys thought might be useful to their corporate clients. The employees in this situation were no different than any other witness.

C. There is no authority for the expansion of the privilege sought by defendants to include employees below the control group.

The defendants offer neither valid policy reasons nor relevant authority for departure from the standards developed in *City of Philadelphia* v. *Westinghouse Electric*

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* (Continued)

fear of contradiction that the employee's conduct was contrary to alleged corporate policy. See *Di-Wal, Inc.* v. *Fibreboard Corp.*, 1970 CCH Trade Cases ¶ 73,155, at pp. 88,556-7 (N.D. Cal. 1970) (summary judgment for defendant based in part upon company's published policy to comply with the antitrust laws).

Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962); *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968); and *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963), which define the breadth of the attorney-corporate client privilege as limited to those individuals in a position to direct corporate action on the legal advice allegedly sought.[10] While defendants have catalogued state cases extending the privilege to accident reports from corporate employees (Brief of Respondents 34-36), there is strong state authority to the contrary. *E.g.*, *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E.2d 802, 806 (1964); *Golminas* v. *Fred Teitelbaum Construction Co.*, 251 N.E. 2d 314, 317 (Ill. App. Ct. 1969).[11] In any event, federal rules of privilege should be applied to protect the essential character and integrity of the fact-finding processes in cases arising under federal law. See *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1099-1100 (5th Cir. 1970).

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[10] None of the earlier federal decisions cited by defendants were required or undertook to delineate the scope of the claimed privilege. Still, these decisions recognized that no privilege attaches to a communication unless made by the person involved for the purpose of securing legal opinion or services. *E.g.*, *Paper Converting Machine Co.* v. *FMC Corp.*, 215 F. Supp. 249, 251 (E.D. Wis. 1963) (ruling with respect to Item 1); *United States* v. *American Radiator & Standard Sanitary Corp.*, 1958 CCH Trade Cases ¶ 68,954, p. 73,833 (W.D. Pa. 1958).

[11] The defendants lay particular stress upon the decision in *D. I. Chadbourne* v. *Superior Court*, 388 P.2d 700 (Cal. 1964). Yet in that case the court concluded there was no showing that the statement of the interviewed employee "emanated from him in his capacity as a spokesman for the corporation" (at 708) or that he spoke with any intention or expectation of confidentiality. Consequently, the court refused to disturb the trial judge's finding "that the statement was not protected by the attorney-client privilege." (at 711)

The competing interests in this area were weighed by the distinguished and disinterested committee preparing the Proposed Rules of Evidence for the United States District Courts and Magistrates. Its preliminary draft (March 1969) recommends the control group test, as applied by the District Court, to define the attorney-corporate client privilege. 46 F.R.D. 249-253. Since the privilege suppresses relevant facts, the interests of justice require that the privilege be carefully interpreted and strictly confined. The well reasoned decision of the District Court limits the detrimental effects of the privilege, but still protects legal counseling by corporate lawyers in accordance with the appropriate and traditional purpose of the attorney-client privilege.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 113

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, ET AL.,
Petitioners,

vs.

HARPER & ROW, PUBLISHERS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE NORTHAMPTON COUNTY, PENNSYLVANIA, BAR ASSOCIATION FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1970

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HONORABLE BERNARD M. DECKER,
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Respondents.

MOTION OF THE NORTHAMPTON COUNTY, PENNSYLVANIA, BAR ASSOCIATION FOR LEAVE TO JOIN IN THE BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

The Northampton County, Pennsylvania, Bar Association (the Northampton Association) respectfully moves for leave to join in the brief of the American Bar Association as *amicus curiae*. The respondents and the American Bar Association, as *amicus curiae*, have consented to the action of the Northampton Association; the consent of the petitioners was not requested since such consent has been withheld in other instances.

The Northampton Association is headquartered in Easton, Pennsylvania, the county seat of Northampton County, which includes the City of Easton, a portion of the City of Bethlehem and numerous small communities. The Northampton Association has more than 150 attorneys as members.

The Northampton Association believes that all corporate employees should be entitled to the benefit of advice of counsel on matters arising out of their employment and therefore urges affirmance of the decision reached by the Court of Appeals for the Seventh Circuit in reversing the District Court's finding in *Decker v. Harper & Row Publishers, Inc.* that the attorney-client privilege should be limited to the so-called "control group" employees constituting the higher echelon of corporate management.

Employees of corporations require legal advice both in their capacity as corporate employees and as individuals. Most corporations demand compliance by employees with Federal and state laws as well as administrative regulations. Federal and state laws cover the gamut of corporate operations ranging from laws and regulations affecting environmental controls to antitrust procedures to standards for hiring and promotion of employees. In order to comply with those laws, an interpretation of them, particularly as they may relate to a proposed course of conduct, often requires legal guidance. In today's complex society, without legal guidance an employee would be in a maze.

The Northampton Association's experience indicates that employees who might not be considered "control group" members frequently are in greater need of legal advice than those who would clearly qualify as within the "control group". In many cases, such employees lack sophistication in handling complex corporate legal problems. In order to protect themselves and their corporate employers, those employees should be encouraged to seek, or at least not be discouraged from seeking, legal advice and counsel.

In order to be in a position to render competent advice, it is important for the attorney to be aware of all pertinent circumstances. One of the matters of greatest concern to members of the practicing bar is the failure of a client, generally because of inadvertence or ignorance, to "tell the whole story". A corporate lawyer frequently is required to examine an employee at some length regarding his conduct and as to the factors which bear upon the course of conduct proposed or chosen. Proper defense in those areas where criminal

conduct might possibly be involved makes it imperative that the lawyer have complete information. One of the important reasons behind the recognition of the attorney-client privilege has been to encourage full disclosure by the client. There is no reason to discriminate against corporate employees in the application of the attorney-client privilege.

The laws of the Commonwealth of Pennsylvania specifically recognize the attorney-client privilege. Under the heading "Confidential communications to attorney" the Criminal Procedure Act of Pennsylvania provides:

> "Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client, or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client." 19 Purdon's Penna. Statutes Annotated 686.

The importance and sanctity of the attorney-client privilege in Pennsylvania have been so widely accepted that there have been very few court decisions interpreting it and none questioning it.

Since most business today is carried on through the corporate form by corporate employees, it is important to preserve to the fullest measure the applicability of the attorney-client privilege for corporate employees.

WHEREFORE, the Northampton Association prays that it be granted leave to join in the brief of the American Bar Association as *amicus curiae*.

Respectfully submitted,

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HARPER & ROW PUBLISHERS, INC., ET AL.,
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On Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

BRIEF, AMICUS CURIAE, OF THE COMMONWEALTH OF VIRGINIA ON BEHALF OF THE RESPONDENTS

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On Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

BRIEF, AMICUS CURIAE, OF THE COMMONWEALTH OF VIRGINIA ON BEHALF OF THE RESPONDENTS

The Commonwealth of Virginia on behalf of the Virginia State Bar, by the Attorney General of Virginia, respectfully presents this brief amicus curiae in support of the respondents pursuant to paragraphs 4 and 5 of Rule 42 of the Rules of the Supreme Court of the United States.

The Virginia State Bar Council, an agency of the Commonwealth, on October 10, 1970, unanimously adopted a resolution requesting this action (Appendix I). The resolution expressed the opinion that the issue in this case was critical to the preservation of the integrity of the attorney-client relationship.

Any constriction of the attorney-client privilege is considered by the Commonwealth of Virginia to be inimical to the preservation of our present legal system. The "control-group" test adopted in the court below which results in such a constriction, as applied to corporations and corporate employees, has such an effect and should be rejected by this Court.

In essence the test limits the privilege of attorney-client confidentiality in the corporate setting, to those corporate agents who will play a substantial role in determining how the corporation will act upon the advice received from counsel.

The rule would drastically affect the effectiveness of counsel in his role as an advisor to the corporation and as its advocate when it is confronted with litigation.

In an age where corporations are confronted with a myriad of the statutes, and rules and regulations of various levels of governments and regulatory agencies, the advice of attorneys is critical. The formulation of policies, procedures and practices of corporations most often begins with field personnel rather than on the executive level. These persons must consult with and supply complete factual information to counsel in order that sound legal evaluation and decisions can be made. Yet the control group test of confidentiality offers these field personnel no protection whatsoever. The obvious result is that this level of personnel will become more inhibited in its communications with counsel. Counsel in turn is faced with providing advice based upon a slanted presentation of facts. Corporate officers accustomed to making informed decisions on considered legal opinions will be placed in a position similar to playing Russian roulette with the corporate entity. A rule leading to such results must be considered unwise, if not foolish.

The effect of the "control group" test on litigation, both civil and criminal, is to undermine our traditional adversary system of justice. If we assume that the adversary system is the most effective method of arriving at the truth, the control group test must be rejected. Acceptance of the test is tantamount to a rejection of the adversary system.

In its present form, our system of justice is founded on the premise that when two litigants present the facts, as they know them in their strongest light, the trier of fact will be able to discern the truth. Where either or both of the combatants is placed at a disadvantage with regard to his obtaining the facts, the truth as determined by the trier must be shaded.

When a corporation encounters litigation, it becomes incumbent upon counsel to determine the factual situation from any corporate agent who possesses knowledge of the facts. Many times these agents risk personal civil or criminal liability as a result of the litigation. Such persons must be assured that their communications to counsel are protected. If not the information they give will be slanted, incomplete or refused. Again, counsel is faced with making crucial legal decisions without a full understanding of the factual situation. The courts, counsel, the parties and the community are deprived of the advantages of the adversary system, because one of the advocates is not able to present his case in its best light. Technically, the control group test is a tool of discovery by an advocate. The logical result, however, is that both advocates will be denied complete access to the true facts; both will work with less than the truth. To conclude from this that a court will then be in a position to arrive at the truth is a logical impossibility in our present system.

For these reasons and for those stated by the American Bar Association in its Brief Amicus Curiae In Support of

the Respondents, which are fully adopted herein, the Commonwealth of Virginia urges the Court to affirm the decision of the Court of Appeals in this cause.

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CERTIFICATE

I, Anthony F. Troy, Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and one of counsel for the Commonwealth of Virginia, in the above captioned matter, hereby certify that three (3) copies of this Brief, Amicus Curiae, of the Commonwealth of Virginia on Behalf of the Respondents, have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with airmail postage prepaid this 2nd day of December, 1970, pursuant to the provisions of Rule 33 of the Rules of the United States Supreme Court as follows:

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APPENDIX I

RESOLUTION

WHEREAS the Council of the Virginia State Bar is of the opinion that the integrity of the attorney-client relationship must be maintained inviolate in all respects consistent with the administration of justice, including the relationship of attorney with corporate clients; and

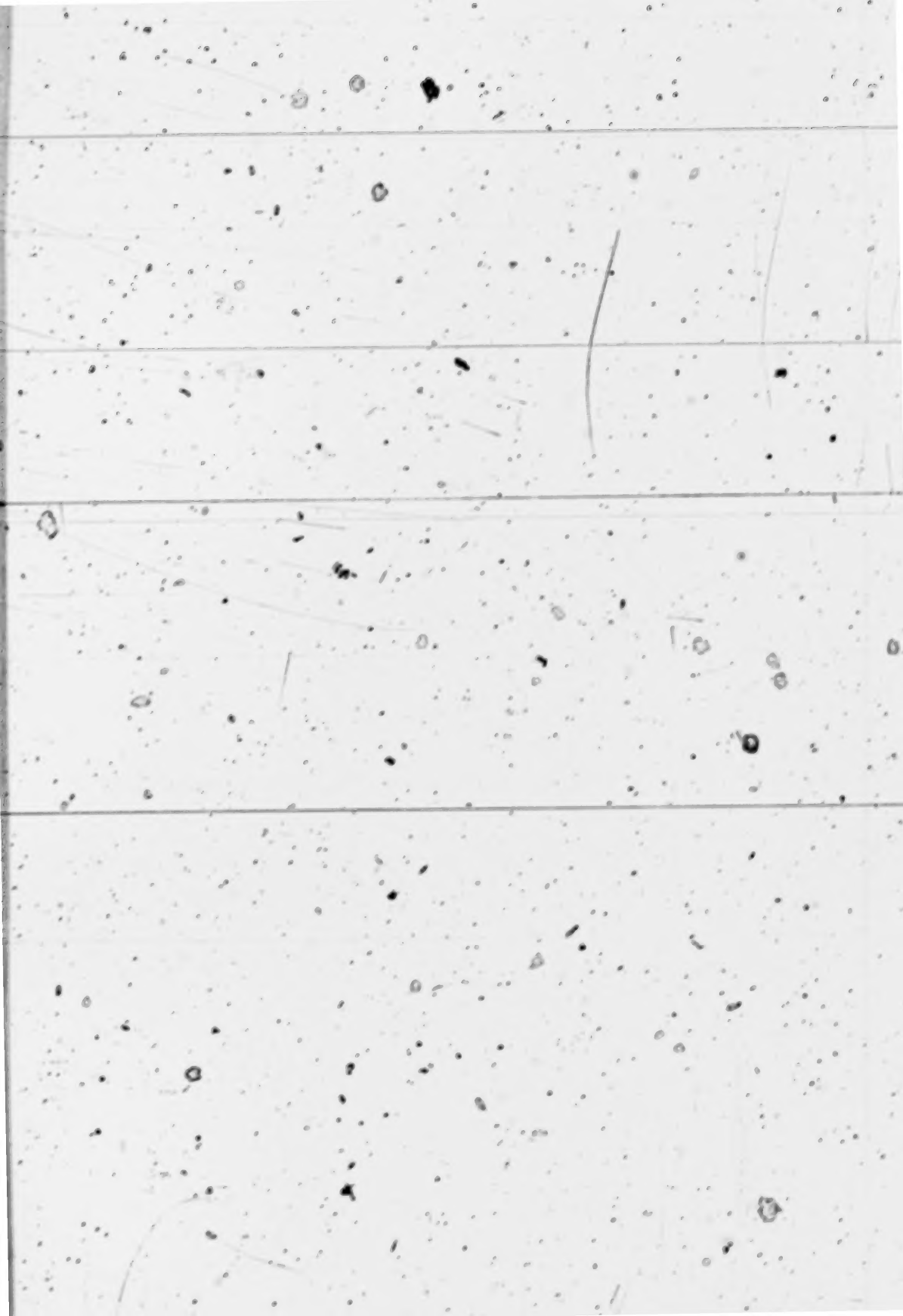
WHEREAS the question of the petitioners in the case of *Decker* v. *Harper & Row Publishers, Inc.*, now before the Supreme Court of the United States on writ of certiorari to the United States Court of Appeals for the Seventh Circuit, does violence to the concept of attorney-client privilege; and

WHEREAS the brief amicus curiae filed in said court on behalf of the American Bar Association in support of respondents expresses the position of the Virginia State Bar;

NOW, THEREFORE, BE IT RESOLVED by the Council of the Virginia State Bar that the officers hereof are authorized and directed, if permitted to do so, pursuant to the Rules of Court, to cause to be filed in the said Supreme Court of the United States, the motion of the Virginia State Bar for leave to join in the brief of the American Bar Association as amicus curiae in said case.

The above resolution was adopted unanimously by the Council of the Virginia State Bar on October 10, 1970.

/s/ N. S. CLIFTON
N. Samuel Clifton,
Executive Director



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No. 113

In the

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Petitioners respectfully pray this Court to vacate its *per curiam* order of January 12, 1971, affirming the decision below by an equally divided vote; stay issuance of the mandate; and defer final disposition of this case until the full bench determines whether to approve, modify or reject the Rules of Evidence for the United States District Courts and Magistrates that are now pending before this Court.

A. The result in this case should be consistent with this Court's action upon the Rules of Evidence for the United States District Courts and Magistrates.

Subsequent to the decision in this case, the Judicial Conference of the United States recommended and transmitted the final draft of the Rules of Evidence to this Court. Rule 5-03, as approved by the Judicial Conference, contains the definition of the attorney-corporate client privilege that is identical to the control group test applied by the District Court in these proceedings.[1]

The Rules of Evidence, if adopted and transmitted to Congress,[2] should control the disposition of this case. This Court has frequently stressed the need to dispose of related cases consistently and to achieve uniformity in the application of the principles of law announced by this Court. *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957).[3] See *Gondeck* v. *Pan American World Airways*, 382 U.S. 25, 27 (1965). If this Court's inconclusive affirmance stands, the petitioners would be alone in their inability to secure access to information that is essential to a fair resolution of this litigation. Such

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[1] In the Proposed Rules of Evidence (March 1969), Rule 5-03(a)(1) includes corporations in its definition of a client, and Rule 5-03(a)(3) defines a representative of the client as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." 46 F.R.D. 161, at 249-257.

[2] 28 U.S.C. § 2072 requires that the Rules of Evidence be transmitted to Congress prior to May 1, 1971.

[3] Justice Harlan, dissenting in *Ohio Power*, conceded that perhaps even "out-of-time action may be justified in some instances where the time interval between a finally decided case and a subsequent contrary decision of this Court is short." 353 U.S. at 110.

a result would defeat the expressed purpose of the Rules of Evidence "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." (Rule 1-02)

The control group test for defining the scope of the attorney-corporate client privilege has been drafted and recommended by a distinguished body of scholars and jurists.[4] Rule 5-03 finely balances the competing interests that have been expressed with respect to the existence of the privilege. Pursuant to 28 U.S.C. § 331, the Rules of Evidence have emerged from extensive, careful and impartial preparation and review.[5]

The Judicial Conference of the United States has reviewed and approved the final draft of the Rules of Evidence, adopting and strongly endorsing the control group test applied by the District Court. The Rules of Evidence now await consideration by all Justices of this Court.

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[4] See *Hanna* v. *Plumer*, 380 U.S. 460, 476 (1965), (Harlan, J., concurring).

[5] The Advisory Committee on the Rules of Evidence, appointed by the Chief Justice of the United States, spent three and a half years drafting the Proposed Rules of Evidence before submitting them to the Standing Committee on January 30, 1969. The Standing Committee thereupon requested and received comments from interested members of the bench and bar until April 1, 1970. In addition, the Proposed Rules of Evidence were discussed at the judicial conferences of each Circuit and the regional seminars attended by members of the Advisory Committee.

B. Resolution of the attorney-corporate client privilege issue would avoid confusion with respect to pretrial discovery in this case, as well as other pending anti-trust suits.

The need to resolve the uncertainty in the application of the attorney-corporate client privilege is especially compelling in view of the fact that the Seventh Circuit erroneously permitted defendants to secure interlocutory review by resort to mandamus. Since this litigation is still pending before the District Court, the enactment of Rule 5-03 will result in a reopening of pretrial discovery and renewal of the request for production of the grand jury debriefing statements. Once the Rules of Evidence have been enacted, "all laws in conflict with such rules shall be of no further force or effect." 28 U.S.C. § 2072. Moreover, newly promulgated rules ordinarily "govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice. . . ."[6] Any potential dilemma with respect to whether the Rules of Evidence should govern additional discovery in the District Court may be avoided by withholding decision in this case until the full bench of this Court passes upon the Rules of Evidence.

This case raises fundamental and important issues to the administration of justice which "ought not to be left with the inconclusive determination" of an affirmance by an equally divided court. *Burns* v. *Wilson*, 346 U.S. 844 (1953) (Frankfurther, J., dissenting). If no action is taken

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[6] *E.g.*, 383 U.S. 1031 (1966 Amendments to Federal Rules of Civil Procedure).

upon the Rules of Evidence, there will remain a conflict among the Circuits with respect to the proper scope of the attorney-corporate client privilege. This confusion should be settled by adoption of the control group test. Note, "Attorney-Client Privilege for Corporation Clients: The Control Group Test," 84 *Harv. L. Rev*: 424, 435 (1970).[7]

C. If left undisturbed, the decision below will work injustice upon petitioners in this case and create an invitation to abuse of the mandamus remedy.

The record in this case presents compelling reasons to afford petitioners access to the grand jury debriefing statements. The debriefing statements already obtained by petitioners disclose that counsel and witnesses suppressed the truth before a federal grand jury and during depositions in these antitrust damage suits. Without repetition of the arguments against allowing defendants to conceal competent and vital evidence behind the claim of attorney-corporate client privilege, we submit that justice requires, at the least, that if this Court intends to promulgate the Rules of Evidence, Rule 5-03 should govern the pretrial discovery in this case.

Moreover, the Seventh Circuit's decision, which places virtually no restraints upon the issuance of writs of mandamus, will doubtless encourage resort to this extraordinary remedy. The use of mandamus by appellate courts to substitute their opinions on disputed questions of law will seriously disrupt trial court proceedings. Frequent mandamus petitions by defendants for interlocutory

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[7] There is pending on petition for certiorari a case that challenges the existence of an attorney-corporate client privilege. *Garner* v. *First American Life Insurance Co.*, No. 1161 (October Term, 1970).

review of pretrial rulings in large antitrust suits[8] threaten to undermine the efficient and fair administration of justice sought to be achieved by consolidation of discovery in multi-district cases under 28 U.S.C. § 1407.[9]

For the foregoing reasons, petitioners request that the *per curiam* order of January 12, 1971, be vacated, that issuance of the mandate be stayed, that the disposition of this case be deferred for reconsideration following this Court's decision to adopt, modify or reject the Rules of Evidence.

Respectfully submitted,

LEE A. FREEMAN
LEE A. FREEMAN, JR.
Attorneys for Petitioners

I certify that this petition for reconsideration is presented in good faith and not for delay.

/s/ Lee A. Freeman, Jr.

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[8] *E.g., Beecham Group Ltd.* v. *Sirica*, No. 24870 (D.C. Cir. 1970).

[9] Adoption of the Rules of Evidence would remove any conceivable justification for the issuance of a writ of mandamus by the Seventh Circuit.

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